APPENDIX D

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

In re	)	Case No. 83-04019-H2-5
	)	83-04020-H1-5
CONTINENTAL AIRLINES CORP.,	)	83-04021-H3-5
CONTINENTAL AIRLINES, INC.,	)	83-04022-H3-5
TEXAS INTERNATIONAL	)	
AIRLINES, INC.,	)	
TXIA HOLDINGS CORP.,	)	(Chapter 11)
	)	
Debtors.	)	Consol. Case
	)	No. 83-04019-H2-5

ORDER

For the reasons set forth in the Findings of Fact and Conclusions of Law attached hereto, the motion of Debtors for summary judgment disallowing the Air Line Pilots Association's claim for contract rejection damages is hereby granted. In the alternative, the claim for contract rejection damages is hereby estimated to have zero value. It is so

ORDERED AND ADJUDGED this the 26th day of June, 1986.

/s/ T. Glover Roberts
UNITED STATES BANKRUPTCY JUDGE

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

IN RE:	83-04019-H2-5
	83-04020-H1-5
CONTINENTAL AIRLINES CORPORATION,	83-04021-H3-5
CONTINENTAL AIRLINES, INC.,	83-04022-H3-5
TEXAS INTERNATIONAL	
AIRLINES, INC.,	Consolidated Case
TXIA HOLDINGS CORPORATION	No. 83-04019-H2-5

FINDINGS OF FACT AND CONCLUSIONS OF LAW WITH RESPECT TO MOTION TO DISALLOW OR TO ESTIMATE AT ZERO VALUE THE CONTRACT REJECTION DAMAGES CLAIMS FILED BY THE AIR LINE PILOTS ASSOCIATION

The following facts are either stipulated, uncontested or established by the evidentiary record in this case, of which the Court takes notice and is considered a proper and adequate basis on which to make these Findings and Conclusions:

FINDINGS OF FACT

1. On September 24, 1983, the Debtors filed petitions for reorganization under chapter 11 of the United States Bankruptcy Code, 11 U.S.C. § 1101, et seq.

2. Thereafter, Continental filed a motion pursuant to § 365(a) of the Bankruptcy Code, 11 U.S.C. § 365(a), to reject the collective bargaining agreement between Continental Airlines,

Inc. ("Continental") and the Air Line Pilots Association ("ALPA"). After an extended evidentiary hearing, the Court on June 19, 1984, entered its order rejecting the collective bargaining agreement between Continental and ALPA that had been in effect on the day Continental filed its bankruptcy petition. Order Allowing Rejection of Collective Bargaining Agreements June 19, 1984. On April 26, 1985, ALPA filed a proof of claim in the amount of $408,348,552.00 for damages arising from the rejection of the collective bargaining agreement.

3. By its terms, the ALPA contract was amendable on September 30, 1984.

4. In its proof of claim, ALPA claimed contract rejection damages for the period September 24, 1983 through and including September 30, 1985, one full year after the scheduled amendable date.

5. On September 23, 1985, Continental filed a Motion for Summary Judgment on Liability for Contract Rejection Damages and to Estimate the Value of Contract Damage Claims. ALPA and the Union Committee strongly opposed Continental's motion.

6. The ALPA contract relative to the motion here is in evidence in the record described above of which this Court has taken notice. This contract is clear and unambiguous. The contract does not contain any guarantee of employment. Instead, it contains terms as to the wages and working conditions which will be provided to employees covered by the agreements when work is available. When work is not available, the contract provides that management may furlough employees, subject to notice of furlough and furlough pay requirements, which

themselves are subject to exceptions for various contingencies not within management's control.

7. At the time of the filing of the bankruptcy petitions in this matter, Continental unilaterally modified work rules and reduced wages and fringe benefits paid to pilots represented by ALPA as well as those of flight attendants and other employees, pending this Court's approval of Continental's motion to reject the contracts under 11 U.S.C. § 365. See In re Continental Airlines Corp., 38 Bankr. 67 (Bankr. S.D. Tex. 1984). This Court approved the rejection of the pilot contract, effective retroactively to September 24, 1983, in accordance with 11 U.S.[C.] § 502(g). This Court found that if Continental had not made changes in its labor contracts, including specifically the ALPA contract, within a short time Continental would have run out of cash and gone out of business. Memorandum of Authorities Authorizing Rejection of Air Line Pilots Association Collective Bargaining Agreements (August 17, 1984) at 33; Findings of Fact and Conclusions of Law Relating To The Rejection Of The Collective Bargaining Agreement With ALPA (August 17, 1984) at ¶¶ 28, 40.

CONCLUSIONS OF LAW

1. The unions contend that this Court, which rejected the ALPA and UFA collective bargaining agreements pursuant to the Bankruptcy Code itself, 11 U.S.C. § 365, now does not have jurisdiction to liquidate the claim or to estimate the value of any damages created thereby through the Bankruptcy Code "breach" of these contracts. 11 U.S.C. § 365(g). This contention is clearly without merit. Bankruptcy courts have jurisdiction to decide the allowability of all claims against an estate. 28 U.S.C. §§ 1334(a), (b)(1), (b)(2)(3).

2. The Court has jurisdiction to resolve on the merits the question of liability, if any, and damage claims for contract rejection presented by the present motion. The motion does not require direct interpretation or application of the statutory language of Federal Labor Statutes or any other federal statutes regulating any interstate commerce, and therefore § 157(d) is inapplicable here. The question tests squarely in the bankruptcy claims adjudication process. 11 U.S.C. § 502. In re Continental Air Lines, Inc., Order Granting Debtors' Motion to Estimate, 57 Bankr. 841 (S.D. Tex. 1985).

3. Further, use of the estimation procedure by this Court will allow Continental's reorganization plan to proceed without unnecessary or costly delay to Continental or other creditor groups who may have reached agreement relative to debt repayment. The estimation procedure can, however, be simplified by resolution of the summary judgment issues now on file by the Court's review of undisputed facts and facts previously established in the case, and application of the appropriate law.

4. The courts have recognized that bankruptcy judges have discretion to determine the allowability of claims in bankruptcy even if the claim ordinarily would have been liquidated by another tribunal. Of course, in the absence of bankruptcy, every claim would have been resolved in another forum. In Zimmerman v. Continental Air Lines, Inc., 712 F.2d 55, 56 (3d Cir. 1983), cert. denied, 104 S.Ct. 699 (1984), a manufacturing company entered into a contract with Continental which contained an arbitration clause. The Arbitration Act, 9 U.S.C. §§ 1-208, "requires a federal court to stay proceedings pending arbitration if issues pertinent to the dispute are also the subject of an arbitration agreement between the parties." 712 F.2d at 56. Subsequently, the manufacturing company went into bankruptcy and initiated

adversary proceedings against Continental alleging that Continental's claim under the contract was improper. Under the authority of the Arbitration Act, Continental requested that the matter be deferred to arbitration.

The bankruptcy court there denied Continental's request, the Third Circuit affirmed, and the Supreme Court denied certiorari. Relying on the policies underlying the 1978 Bankruptcy Reform Act, the Third Circuit held that the Act impliedly modified the express provisions of the Arbitration Act. 712 F.2d at 56, 59.

> Bankruptcy proceedings, however, have long held a special place in the federal judicial system. Because of their importance to the smooth functioning of the nation's commercial activities, they are one of the few areas where Congress has expressly preempted state court jurisdiction. See 28 U.S.C. § 1334. While the sanctity of arbitration is a fundamental federal concern, it cannot be said to occupy a position of similar importance. Therefore, because of the importance of bankruptcy proceedings in general, and the need for the expeditious resolution of bankruptcy matters in particular, we hold that the intentions of Congress will be better realized if the bankruptcy Reform Act is read to impliedly modify the Arbitration Act. Thus while a bankruptcy court would have the power to stay proceedings pending arbitration, the use of this power is left to the sound discretion of the Bankruptcy Court.

712 F.2d at 59-60 (emphasis supplied).

5. The unions rely upon Gary Aircraft Corp. v. United States (In re Gary Aircraft Corp.), 698 F.2d 775 (5th Cir.), cert. denied, 104 S.Ct. 82 (1983), and argue that bankruptcy courts lack

jurisdiction to disallow claims in disputes that Congress has committed to a specialized tribunal. The union's reliance on Gary Aircraft is misplaced. Gary merely established that, under the 1898 Act, bankruptcy courts ordinarily should defer to the Armed Services Board of Contract Appeals ("ASBCA") for the liquidation of claims arising from government defense contracts. (The Gary case factually originated with Gary filing a claim under its contract against the government, and with the government filing a counterclaim.) The case does not provide that bankruptcy courts have no "jurisdiction" over such claims. Moreover, the Fifth Circuit based its decision on its findings that deferral would not impair the satisfaction of other bankruptcy claims and that government contracts are extremely complex, technical and esoteric, 698 F.2d at 782, not on the proposition that every claim in bankruptcy which otherwise would have been decided by a "specialized tribunal" should be liquidated by that tribunal.

To the contrary, the Fifth Circuit expressly acknowledged that, where bankruptcy court estimation or liquidation by the ASBCA would unduly delay the administration of the estate, the bankruptcy court retains the power under the 1898 Act to disallow the claim in its entirety. 698 F.2d at 784 n.7. Under the 1973 Bankruptcy Code, which applies to this proceeding, the authority of a bankruptcy court to estimate the value of unliquidated claims is, if anything, even stronger, since new 11 U.S.C. § 502(c) requires the court to estimate the value of unliquidated claims

where liquidation would unduly delay reorganization.[1] The 1978 Act significantly expanded bankruptcy subject matter jurisdiction:

> [The 1978 Act] evidenced a strong Congressional and federal policy in favor of the newly created bankruptcy court having jurisdiction which is sufficiently broad to promptly and expeditiously hear and determine all controversies involving matters of law, equally and even admiralty.

In re Cross Electric Co., 9 Bankr. 408, 410 (Bankr. W.D. Va. 1981); see Zimmerman v. Continental Air Lines, Inc., supra, 712 F.2d at 56.

6. In addition, Continental's motion for summary judgment and estimation in this claims proceeding presents a very different case for bankruptcy court resolution of the issues than was present in Gary. First, unlike Gary, the time necessary to complete arbitration of the union's multi-million dollar contract rejection claims could seriously impair the claims and interests of

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[1] See Addison v. Langston (In re Brints Cotton Marketing, Inc.), 737 F.2d 1338, 1340-41 (5th Cir. 1984); In re Curtis, 40 Bankr. 793, 801 n.7 (W.D. La. 1984); In re Nova Real Estate Investment Trust, 23 Bankr. 62, 65 (Bankr. E.D. Va. 1982); In re Brada Miller Freight Systems, Inc., 8 Bankr. 62 (Bankr. N.D. Ala. 1980); 3 Collier on Bankruptcy ¶ 502.03 at 502-74, 75 (15th ed. 1985). Accordingly, even if this Court did not have jurisdiction to disallow the claim, it is clear that the Court nevertheless would have jurisdiction to estimate the value of the contract rejection claims. Order Granting Debtors' Motion to Estimate All Contingent Unliquidated Employee Claims For Purposes of Chapter 11 Confirmation Pursuant to Section 502(c) of the Bankruptcy Code (Sept. 26, 1985). Thus, for example, courts may estimate the value of claims asserted on behalf of employees by the NLRB, without deferring to any NLRB administrative process, which might otherwise apply. In re Unit Parts Co., 9 Bankr. 386 (W.D. Okl. 1981) (court rejects the same arguments and authorities presented by the unions here, refusing to defer to NLRB, noting that these authorities predate the 1978 expansion of bankruptcy court jurisdiction).

the substantial body of other creditors who have already settled with the debtors and now await distribution. As pointed out in another case, in Gary "the only asset of the bankrupt's estate . . . consisted of a . . . contractual claim against the United States government." In re Compton Corp., 40 Bankr. 880, 884 (Bankr. N.D. Tex. 1984). Where resolution of a claim could "affect the amount, existence and priority of claims to be paid out of the general funds, and thus involve the interest of other creditors," courts have held that a bankruptcy judge does not abuse his discretion in refusing to compel arbitration of such a claim. In re F&T Contractors, Inc., 649 F.2d 1229, 1232 (6th Cir. 1981); see Johnson v. England, 356 F.2d 44, 51-52 (9th Cir.), cert. denied, 384 U.S. 961 (1966). Moreover, since "[p]rotection of general creditors is a major function of . . . bankruptcy proceedings," submission of the union claims to arbitration would be particularly unsound because Continental's creditors have not consented to arbitration and would have no right to participate in the arbitration process. 649 F.2d at 1233 n.1; 356 F.2d at 52.[2]

Second, unlike the ASBCA in Gary, RLA arbitration panels (system boards of adjustment) are not specialized tribunals with particular expertise in the specific issues of fact that must be resolved in order to value the claim as it relates to this proceeding. If presented to a system board, bankruptcy contract rejection claims would be decided by arbitrators who would not necessarily be more familiar with the particular contract language or past practice of the parties than is this Court, and who may, like this Court, have to take evidence and hear testimony in order to resolve any actual issues of fact, if any exist. Unlike the Court, however, the arbitrators would have no cognizance of the reor-

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[2] In addition, in arbitration there would be no right to discovery, arbitrators are less likely to follow legal standards than courts, and judicial review would be limited. See Zimmerman, Cross and Johnson, supra.

ganization or the interests of other creditors. Particularly, in these circumstances, deferral to arbitration is not required. See In re Amalgamated Foods, Inc., 41 Bankr. 616, 617, 619 (Bankr. C.D. Cal. 1984) (debtor need not submit claims under the Employee Retirement Income and Security Act to arbitration since the bankruptcy claims process is adequate to resolve claims.)

Third, Gary was decided under the 1898 Act. Bankruptcy courts which have considered Gary generally have found it inappropriate to defer claims to another forum in cases under the 1978 Code. For example, in Amalgamated Foods, the court refused to defer a claim under the Employee Retirement Income Security Act ("ERISA") to arbitration even though the statute contains a mandatory arbitration procedure. Distinguishing Gary and Nathanson v. NLRB, 344 U.S. 25 (1952), the court rejected the creditor's contention that the claim required expertise not possessed by the court. 41 Bankr. at 618-619. Comparing the bankruptcy claims process under the 1978 Bankruptcy Reform Act to ERISA's statutory arbitration procedure, the court concluded that both procedures furthered the policy of speedy disposition.

> I find that the bankruptcy claims procedure achieves the goal sought by ERISA arbitration — indeed, that the claims procedure may serve that goal better than ERISA arbitration itself. For that reason, I hold that the debtor may bypass arbitration in favor of the claims procedure.

41 Bankr. at 616-617. See also In re Page-Wilson Corp., 37 Bankr. 527, 529 (Bankr. D. Conn. 1984); In re Compton Corp., supra, 40 Bankr. at 884.

These cases are undoubtedly correct, since the Bankruptcy Reform Act of 1978:

> [S]ignificantly expands the jurisdiction of the bankruptcy courts and is based on the notion that to protect the positions of both the bankrupt and its creditors, bankruptcy actions should not be subject to unnecessary delay and all claims and issues relevant to such action should be resolved in one expeditious proceeding.

Zimmerman v. Continental Air Lines, supra, 712 F.2d at 56 (emphasis supplied).[3]

7. Finally, and most conclusively, in NLRB v. Bildisco & Bildisco, 104 S.Ct. 1188 (1984), the Supreme Court said that claims for damages arising out of the bankruptcy court's own rejection of a collective bargaining agreement must be adjudicated in the bankruptcy court.

> [C]laims arising after filing, such as result from the rejection of an executory contract, must also be presented through the normal administration process by which claims are estimated and classified. See 11 U.S.C. § 502(g); In re Hoe & Co., Inc., 508 F.2d 1126, 1132 (2nd Cir. 1974); Workman v. Harrison, 282 F.2d 693, 699 (10th Cir. 1960). Thus, suit may not be brought against the debtor-i[n] possession under the collective bargaining agreement; recovery may be had only through administration of the claim in bankruptcy.

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[3] The Bankruptcy Amendments and Federal Judgeship Act of 1984, Pub. L. No. 98-353, did not detract from bankruptcy court subject matter jurisdiction, but merely allocated the exercise of that jurisdiction between the bankruptcy and district courts. 28 U.S.C. § 1334; 1 Collier on Bankruptcy ¶ 3.01 at 3-19 to 3-29 (15th ed. 1985); Carlton v. BAWW, Inc., 751 F.2d 781 (5th Cir. 1985).

104 S.Ct. at 1198-99 (emphasis suppl[i]ed). Thus, Gary presents no obstacle to the resolution of this Court of the claims issues, and the unions' jurisdictional objections are totally without merit.

8. Although the rejection of an executory contract constitutes a breach of that contract, 11 U.S.C. § 365(g), Section 502(b)(1) of the Bankruptcy Code, 11 U.S.C. § 502(b)(1), provides that a claim against an estate in bankruptcy is to be disallowed if such claim "is unenforceable against the debtor and property of the debtor, under any agreement or applicable law for a reason other than because such claim is contingent or unmatured." The legal standards for measuring the value of a bankruptcy claim for contract breach are therefore the same as those which would be applied if the bankruptcy had not occurred. In re Nuisance Corp., 17 Bankr. 80, 82 (Bankr. D.N.J. 1981); 3 Collier on Bankruptcy ¶ 502.02, at 502-24 et seq. (15th ed. 1985). A bankrupt in breach of contract pursuant to 11 U.S.C. § 365 may assert any defense to the liability flowing from the statutorily created breach which any other promisor in breach of contract may assert. Mazirow v. Grigsby (In re White Motor Corp.), 44 Bankr. 563 (N.D. Ohio 1984).

9. The Court must therefore determine the allowability of these claims by applying the appropriate substantive law which would have been applied in the non-bankruptcy context. See, e.g., Woods-Tucker Leasing Corp. v. Hutcheson-Ingram Development Co., 642 F.2d 744, 748 n.8 (5th Cir. 1981); Vanston Bondholders Protective Committee v. Green, 329 U.S. 156, 161 (1946).

10. The rejected contract was entered into pursuant to the Railway Labor Act, 45 U.S.C. §§ 151, et seq., as expressly stated at the outset of the contract. A Railway Labor Act contract, "like the Labor-Management Relations Act § 301 contract, is a federal

contract and is therefore governed and enforceable by federal law, in the federal courts." IAM v. Central Airlines, Inc., 372 U.S. 682, 692 (1963). The Supreme Court has also held that "the substantive law to apply in suits under § 301(a) is federal law, which the courts must fashion from the policy of our national labor laws." Textile Workers of America v. Lincoln Mills of Alabama, 353 U.S. 448, 456 (1957). Although Continental is subject to the Railway Labor Act, the federal courts have often looked to decisions interpreting the National Labor Relations Act, including § 301 of the LMRA amendments to that Act, for guidance in RLA matters. See generally Trainmen v. Jacksonville Terminal Co., 394 U.S. 369, 383 (1969) (although NLRA cannot be imported wholesale into the railway labor area, NLRA case law provides "the most relevant corpus of national labor policy"); Japan Airlines Co. v. IAM, 538 F.2d 46 (2d Cir. 1976) (using NLRA Supreme Court decisions to delineate scope of mandatory subjects of bargaining under the RLA).

11. As a matter of federal labor law, employees subject to a collective bargaining agreement are not entitled to lost future wages as damages under such an agreement when the employer ceases operations, unless the agreement guarantees future employment. See, e.g., J.I. Case v. NLRB, 321 U.S. 332 (1943); Fraser v. Magic Chef-Food Giant Markets, Inc., 324 F.2d 853 (6th Cir. 1963); American Bakery & Confectionery Workers v. Great Atlantic & Pacific Tea Co., 357 F. Supp. 1322 (W.D.Pa. 1973), aff'd mem., 491 F.2d 748 (3d Cir. 1974); Abbington v. Dayton Malleable, Inc., 561 F. Supp. 1290 (S.D. Ohio 1983), aff'd mem., 738 F.2d 438 (6th Cir. 1984); Union de Trabajadores v. Helio San Jeronimo Corp., 434 F. Supp. 643 (D.P.R. 1977); Hotel & Restaurant Employees Alliance, Local 237 v. Allegheny Hotel Co., 374 F. Supp. 1259 (W.D. Pa. 1974). As noted above, the contract at issue did not guarantee employment, but only provided the terms and conditions applicable to available work.

The presence of contract provisions which permitted management to furlough employees confirms that by their own terms these contracts were not understood or intended to constitute guarantees of employment.

12. As a matter of federal labor law under both the NLRA and the RLA, and as a matter of the common law of contracts in general, no promisee is entitled to more than nominal damages for breach of contract unless that promisee can demonstrate actual injury proximately caused by the breach. IBEW v. A-1 Electrical Services, 535 F.2d 1, 3 (10th Cir.), cert. denied, 429 U.S. 832 (1976); Brotherhood of R.R. Trainmen v. Denver & R. G. W. R. Co., 338 F.2d 407 (10th Cir. 1964), cert. denied, 380 U.S. 972 (1965); Restatement (Second) of Contracts §§ 346-347.

13. As noted above, but for the rejection of the collective bargaining agreement, Continental would have ceased operations and pilots would have had no cognizable claims for lost future wages because the rejected contracts did not obligate Continental to provide employment, but rather only established rates of pay and working conditions for any employment which was available. Federal labor law does not require an award of damages for time periods during which no work would have been available in any event, even where an employee was discharged in violation of the NLRA. See NLRB v. Biscayne Television Corp., 337 F.2d 267, 268 (5th Cir. 1964); Nabors v. NLRB, 323 F.2d 686, 690 (5th Cir. 1964); Midland Ross, Inc., 239 N.L.R.B. 1205 (1979), order enf'd, 653 F.2d 239 (6th Cir. 1981); NLRB v. United Contractors, Inc., 614 F.2d 134, 138 (7th Cir, 1980); NLRB v. Columbia Tribune Publishing Co., 495 F.2d 1384, 1393 (8th Cir. 1974); NLRB v. American Creosoting Co., 139 F.2d 193 (6th Cir. 1943); Brown & Root, Inc, 112 N.L.R.B. 295 (1955); Lauren Burt, Inc. of Colorado, 114 N.L.R.B. 295 (1955); Hill Transportation Co., 102

N.L.R.B. 1015 (1953). But for the Court's rejection of the collective bargaining agreement at issue here, Continental would have gone out of business and pilots represented by ALPA could not have claimed lost future wages as damages, because the agreements did not guarantee future employment.

14. Even if ALPA's claim for damages was meritorious, ALPA's damage calculations are flawed. The amount of damages to be awarded for breach of a collective bargaining agreement is limited by both the termination date of the agreement at issue and by the application of 11 U.S.C. § 502(b)(7). The termination date of the contract establishes the ending date for damage calculation purposes.

> The fact that the contract which was breached was due to expire April 30, 1976, is controlling as to the period for which damages may be awarded. Nothing in that contract could have created an expectation that the employees would have continued to enjoy the same wages and benefits beyond the expiration of the contract.

IBT v. Standard Brands, 579 F.2d 1292, 1295 (5th Cir. 1978), cert. denied, 443 U.S. 913 (1979). Accord, UAW v. Roblin Industries, 561 F. Supp. 288, 298 (W.D. Mich. 1983) (rights under agreements can extend beyond expiration date only if agreement so provides); Sun Oil Co. of Pa. v. NLRB, 576 F.2d 553, 558 (3d Cir. 1978); Baker v. Fleet Maintenance, Inc., 409 F.2d 551, 554 (7th Cir. 1969); In re Vic Snyder, Inc., 23 Bankr. 185 (E.D. Pa. 1982). As previously noted, the ALPA contract expired by its own terms on September 30, 1984. ALPA's use of September 30, 1985 as the ending date for the contract in its calculations is based upon assertions regarding the "average" length of negotiations in the airline industry. These assertions are unsupported by any probative

evidence and have not been shown to bear any relationship to the "average" length of negotiations at Continental and Texas International Airlines, as ALPA's own witnesses admitted in depositions regarding their calculations. Deposition of Dennis Higgins at 161-63, 165 (Aug. 8, 1985); Deposition of Jalmer Johnson at 112-13 (Aug. 7, 1985), 235-37 (Aug. 13, 1985). The assertions bear no relationship at all to what, in fact, would have happened to Continental, which was not in "average" financial condition, if the contracts had not been rejected.

15. Continental's obligation, under the Railway Labor Act, to maintain the "status quo" after the contracts expired is excused by the Bankruptcy Code. NLRB v. Bildisco & Bildisco, 104 S.Ct. 1188 (1984) (despite statutory obligation to maintain wages and working conditions provided for in collective bargaining agreement, Chapter 11 debtors may unilaterally lower wages prior to order rejecting the agreement); Memorandum of Authorities Authorizing Rejection of Air Line Pilots Association on Collective Bargaining Agreements (August 17, 1984) at 30-40.

16. An addition to the restriction on damages created by the term of the contract, Section 502(b)(7), 11 U.S.C. § 502(b)(7), further limits damages for breach of "employment contracts" to a maximum of one year's compensation. Collective bargaining agreements are "employment contracts" within the meaning of 11 U.S.C. § 502(b)(7). In re Cortland Container Corp., 30 Bankr. 715 (Bankr. N.D. Ohio 1983).

17. ALPA's reliance on the Report of the Commission on the Bankruptcy Laws of the United States, H.R. Doc. No. 93-137 (1973), to argue that Section 502(b)(7) does not apply to collective bargaining agreements is unpersuasive. In that Report, a commission (not the Congress) described a provision similar to

what became Section 502(b)(7) as "principally" (not exclusively) intended to apply to long-term management contracts, and to the termination of contracts for future "athletic, entertainment or other services." The language under discussion itself indicates that the commission did not intend the cap provision to apply only to such contracts. Moreover, the report in questions is not part of the legislative history of the 1978 Bankruptcy Code at all, but is a report of a national commission on bankruptcy which concluded its proceedings five years before the 1978 Code was enacted. As enacted, § 502(b)(7) contains no limitation to "management," "entertainment" or "sports" contracts. The legislative history of the 1978 Code reflects only an intention to track a similar provision on leases, which had placed a cap on the damages which might be claimed for the rejection of a lease to prevent unjust enrichment of a lessor. H.R. Rep. No. 95-595, 95th Cong., 1st Sess. 352-354 (1977); S. Rep. No. 95-989, 95th Cong., 2d Sess. 62-65 (1978).

18. No affidavits or other admissable evidence have been offered to establish that there is a genuine dispute as to material fact. Because this Court is persuaded that Continental is entitled to judgment as a matter of law, summary judgment is appropriate and will be granted. Federal Rules of Civil Procedure 56(e).

19. For the foregoing reasons, ALPA's claim for contract rejection damages will be disallowed in this entirety.

20. This Court further rules that the value of ALPA's claim for contract rejection damages, pursuant to its proof of claim, is estimated, pursuant to 11 U.S.C. § 502(c), to be zero based upon the Court's conclusion that these claims are ultimately without merit.

The Court would note that even if the damages for breach of the collective bargaining agreements were deemed appropriate, ALPA's contract rejection damages claims would be limited to the lesser of one year's compensation or the compensation due under the contracts from September 24, 1983 to the date that the contract was no longer effective by its own terms. Damages would thus be limited to compensation for the period September 24, 1983 to September 24, 1984. These Findings of Fact and Conclusions of Law are hereby incorporated in and made a part of the order attached hereto. It is so

ORDERED AND ADJUDGED this the 26th day of June, 1986.

/s/ T. Glover Roberts
UNITED STATES BANKRUPTCY JUDGE

APPENDIX E

APPENDIX E

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
ENTERED

MAR 13 1989
Jessee E. Clark, Clerk
By Deputy: /s/

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

In re	§	
	§	CONSOLIDATED
CONTINENTAL AIRLINES CORP., et al.,	§	BANKRUPTCY
Debtors.	§	CASE NO.
	§	83-04019-H2-5
	§	
AIR LINE PILOTS ASSOCIATION, INTERNATIONAL,	§	
Appellant,	§	CIV. NO. H-85-6151
v.	§	
CONTINENTAL AIRLINES CORP., et al.,	§	
Appellees.	§	
	§	
O'NEILL GROUP,	§	
Appellant,	§	CIV. NO. H-87-2321
v.	§	
CONTINENTAL AIR LINES, INC., et al.,	§	
Appellees.	§	
	§	

UNION OF FLIGHT ATTENDANTS, Appellant,	§	
	§	CIV. NO. H-85-2271
v.	§	
CONTINENTAL AIRLINES CORP., et al., Appellees.	§	

IT IS ORDERED that the Bankruptcy Court's Orders of September 10, 1985, May 8, 1986 and June 26, 1986 denying contract rejection damages claims are hereby AFFIRMED.

DATED this 10th day of March, 1989.

/s/ John V. Singleton, Jr.
JUDGE SINGLETON

APPENDIX F

APPENDIX F

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
ENTERED

AUG 04 1989
Jesse E. Clark, Clerk
By Deputy: /s/

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

IN RE:	§	
CONTINENTAL AIRLINES, INC.,	§	BANKRUPTCY
	§	CASE NO.
Debtor	§	83-04019-H2-5
	§	
	§	
JAMES C. STEPHENS, ET AL.,	§	
JOSEPH E. O'NEILL, ET AL.,	§	
	§	
Appellants,	§	
	§	
VS.	§	CASE NO. H-87-3705
	§	
CONTINENTAL AIRLINES, INC.,	§	
	§	
Appellee	§	

MEMORANDUM & ORDER

The matter now before this Court is the appeal of the Bankruptcy Court's June 27, 1986 Order granting Continental Airline's Motion for Summary Judgment Disallowing and Estimating at Zero the Furlough Pay Claims filed by Individual Continental Pilots.

I. BACKGROUND

A. Continental Enters Bankruptcy

On September 24, 1983 Continental Airlines, Inc. and Texas International Airlines, Inc. filed petitions for reorganization pursuant to Chapter 11 of the United States Bankruptcy Code, 11 U.S.C. § 1101 et seq. Continental immediately suspended its domestic passenger service, but announced that it would resume those operations on September 27, 1983. Continental's international operations continued without interruption. As permitted by 11 U.S.C. § 502(g), Continental rejected its collective bargaining agreement with the Airline Pilots Association ("ALPA"), commonly called the "Red Book," and that rejection was subsequently approved by the Bankruptcy Court retroactive to September 24, 1983.

Although Continental furloughed numerous management, clerical and maintenance employees on September 24, 1983, Continental claims that no pilots were furloughed. Continental implemented emergency work rules for pilots and other employees, and advised pilots of the new work rules by a letter distributed by Company telex and mailed to their homes on September 24, 1983. Continental did not issue any furlough notices to pilots, and the

Chairman of ALPA's negotiating committee admitted during testimony in the Bankruptcy Court that John Adams, Vice President of Personnel, expressly notified him that pilots were not on furlough status and that, as active employees, pilots would continue to be covered by health insurance. Continental officials began calling pilots shortly after the bankruptcy petitions were filed to ask them to report for work when operations resumed on September 27, 1983.

On October 1, 1983 ALPA and the Union of Flight Attendants each commenced strikes against Continental in response to Continental's implementation of the emergency work rules. The International Association of Machinists and Aerospace Workers had previously called a strike to begin August 13, 1983. All three unions established picket lines at company facilities, and urged their members not to report for work. Notwithstanding the strikes, Continental began to rebuild its system and made a strenuous effort to get striking pilots to return to service. When it became clear that Continental could not encourage enough striking pilots to return to work to meet its staffing needs, Continental began hiring replacement pilots in November 1983.

On June 19, 1984 the Bankruptcy Court approved Continental's rejection of the ALPA collective bargaining agreement, effective retroactively to September 24, 1983, in accordance with 11 U.S.C. § 502(g). In approving the rejection of the ALPA collective bargaining agreement, the Bankruptcy Court concluded in its August 17, 1984 Order that:

> [H]ad Continental not made its unilateral changes in pilot pay and work rules, it would have been unable to continue its operations for very much longer for want of necessary cash and, because it could not compete effectively with the low

cost carriers in direct competition with it, it would have continued losing money until it closed its doors.

In Re Continental Airlines, et al. No. 83-04019-H2-5 (Bankr. S.D. Tex. 1984) (Memorandum authorizing rejection of ALPA collective bargaining agreement).

B. ALPA Files Claims Against Continental

On April 26, 1985 ALPA filed bankruptcy claims on behalf of all Continental pilots, including a claim for alleged damages arising from the rejection by the Bankruptcy Court of ALPA's prepetition collective bargaining agreement with Continental, and for alleged wrongful constructive discharge of pilots by virtue of the rejection of the ALPA contract and the institution of new work rules for pilots.

By orders dated September 10, 1985 and June 26, 1986 the Bankruptcy Court granted Continental's motions for summary judgment on contract rejection damage claims. The Court held that, as a matter of federal labor law, employees were not entitled to contract rejection damages for time periods during which they were on strike; that they were not entitled to damages for periods of time not on strike because the rejected collective bargaining agreements were not a guarantee of employment and wages; and that Continental would have gone out of business if its labor agreements had not been rejected, in which case pilots would have had no cognizable claims for lost future wages. On October 1, 1985 the Bankruptcy Court disallowed ALPA's claims for wrongful constructive discharge damages, finding that the change in wages and work rules that occurred on September 24, 1983 did not constitute a constructive discharge. In re Continental Air-

lines., 57 Bankr. 845 (Bankr. S.D. Tex. 1985), appeal dismissed, Civil Action No. H-86-253 (S.D. Tex. Aug. 29, 1988).

This Court upheld the September 10, 1985 and June 26, 1986 orders by Order dated March 10, 1989. Although ALPA filed an appeal from the October 1 Order denying claims for constructive discharge, neither the O'Neill group nor any other pilot attempted to intervene into ALPA's appeal. ALPA's appeal was dismissed on August 29, 1988, pursuant to a settlement between ALPA and Continental.

C. The Furlough Pay Claims

The 88 pilots in the Stephens Group and the 347 pilots in the O'Neill Group were among the approximately 1069 pilots who filed individual claims for furlough or severance pay. ALPA did not assert a claim for furlough pay on behalf of any pilots. The Stephens and O'Neill groups' claims for furlough or severance pay are based on the theory that Continental's temporary suspension of its operations between September 24 and September 27, 1983 constituted a "furlough" entitling pilots to furlough pay under the terms of the collective bargaining agreement rejected by the Bankruptcy Court.

On September 30, 1985 Continental filed its Motion for Summary Judgment Disallowing and Estimating at Zero Value the Furlough Pay Claims Filed by Individual Continental Pilots ("Motion for Summary Judgment"). On October 25, 1985 ALPA filed an opposition to which Continental filed a reply. The Stephens and O'Neill Groups later filed their own oppositions to the Motion for Summary Judgment, to which Continental also replied.

On June 27, 1986 the Bankruptcy Court granted Continental's Motion for Summary Judgment and entered Findings of Fact and Conclusions of Law. In re Continental Airlines, 64 Bankr. 882 (Bankr. S.D. Tex. 1986). The Bankruptcy Court found, inter alia, that:

> Neither pilots nor flight attendants were furloughed on September 24, 1983, as that term is used in the respective prepetition collective bargaining agreements. Indeed, pilots and flight attendants were expressly put on notice by the Company's September 24 letter that they were on active status following the bankruptcy. Nor were the pilots or flight attendants "constructively" furloughed by virtue of the temporary shutdown in operations. The Continental-ALPA collective bargaining agreement expressly provides for brief cancellations of scheduled flights, such as occurred during the three-day shut-down... The fact that the collective bargaining agreement included a contract provision, distinct from the furlough pay section, which expressly recognized and provided for the short-term cancellation of flights demonstrates in the opinion of this Court, that the furlough pay provision was not intended to cover the three-day cessation of operations which occurred on September 24.

Id. at 887-88. The Bankruptcy Court further found that "[t]o allow furlough pay in the circumstances presented here would result in the pilots . . . receiving up to five months pay for a mere three-day suspension of work, virtually guaranteeing a windfall for the entire pilot . . . workforce." Id. at 888. Thus, the Court found that "the events of September 24, 1983 did not give rise to furlough pay liability to pilots . . . ." Id. at 890. The Stephens and O'Neill Groups subsequently filed a joint Notice of Appeal on July 7, 1986. On December 3, 1987 this Court dismissed the ap-

peal for failure to comply with Bankruptcy Rule 8009, but the pilot groups' motion to reinstate the appeal was granted on March 10, 1989.

II. DISCUSSION

The Stephens and O'Neill Groups appeal the Bankruptcy Court's June 27, 1986 decision on the grounds that (1) the Bankruptcy Court's finding that a furlough did not occur on September 24, 1983 was erroneous; (2) summary judgment was improper because the evidence raised genuine issues of material fact; (3) the Court's use of the estimation process to value the pilots' furlough pay claims at zero was inappropriate; and (4) the bankruptcy judge was required to recuse himself because of communications he had with one of the law firms representing Continental regarding possible future employment.

None of these contentions has any merit. First, the Bankruptcy Court's determination that a furlough did not occur is fully supported by the evidence, which showed that the notices sent to pilots on September 24 clearly indicated that they were not being furloughed; that Continental's efforts to persuade the pilots to return to their jobs belied any possible intent to furlough them; and that the provisions of the ALPA-Continental collective bargaining agreement did not require that furlough notices be issued in the event of a temporary suspension of operations such as occurred on September 24, 1983.

Second, the Bankruptcy Court's findings of fact were based upon undisputed, competent evidence, including extensive testimony, exhibits and binding rulings from prior bankruptcy proceedings in which the pilots were represented by their union, ALPA.

Third, the pilots' furlough pay claims arise out of the application of the rejected ALPA-Continental collective bargaining agreement. The rejection of that agreement removes any possible basis for the pilots' claims here.

Finally, the Stephens and O'Neill Groups' assertion that the Bankruptcy Court's June 27, 1986 order should be vacated because Judge Roberts, who issued the ruling, engaged in improper, prejudgment employment communications with a law firm representing Continental is without merit. The pilots' own evidence shows that Judge Roberts first discussed employment with the law firm he later joined on July 2, 1986, after he had issued the order on appeal here. Judge Roberts' present employment is irrelevant to this appeal, and appellants have shown no impropriety in his action.

For the reasons summarized above and more fully stated below, this Court is of the opinion that the Bankruptcy Court's granting of summary judgment was proper.

A. The Bankruptcy Court Correctly Determined That The Temporary Cessation Of Operations On September 24, 1983 Did Not Constitute A Furlough.

The Bankruptcy Court correctly determined as a matter of law that the pilots were not entitled to furlough pay because no furlough occurred on September 24, 1983. Continental's communications with its pilots at the time of the shutdown and its immediate efforts to get the pilots to return to their jobs are totally inconsistent with the claim that they were furloughed. Furthermore, the furlough procedures contained in Section 23 of the Red Book clearly demonstrate that a temporary suspension of operations, like that which occurred on September 24, did not

constitute a "furlough" as that term was used in the collective bargaining agreement.

1) No Indicia of Furlough Status

The Stephens Group claims that Continental treated pilots as furloughees during the shutdown. As support for this claim, the Stephens Group cites a September 24, 1983 letter sent to all employees in which Continental expressly stated that it was furloughing management, clerical and maintenance employees and personnel at stations to be closed, and that pilots would work under the new work rules. Despite this language, the Stephens Group contends that the letter, in effect, "directed . . . domestic pilots to absent themselves from work" until further notice from Continental. This, in their view, constituted a furlough in fact. Written notice, according to the Stephens Group, is not a precondition to the occurrence of a furlough. As the Bankruptcy Court correctly found, however, the contract expressly contemplated temporary flight cancellations that would not constitute furloughs. Whether or not the September 24 letter directed pilots to "absent themselves" from work, the fact remains that the letter (1) did not include pilots among the categories of employees to be furloughed, (2) expressly stated that a portion of domestic operations would be restored shortly, and (3) indicated that the pilots would be subject to new work rules. The September 24 letter simply provides no basis for a finding that the pilots were being furloughed at all.

The Stephens Group also argues that the cancellation of dental insurance for a number of pilots proves that these pilots were on furlough in light of Continental's September 29 announcement that all active pilots would be covered by the new group insurance. Accordingly, the Stephens Group contends that pilots who lost

their pre-bankruptcy dental insurance were on furlough rather than active status. This claim is completely without merit. The September 29 mailgram does not state that any pilots were furloughed on or after September 24, but rather explains that only pilots in active status (and not those pilots who were on furlough prior to September 24) would be covered by Continental's new group insurance programs. Unlike the insurance policy in effect prior to the bankruptcy filing, the new group insurance referred to in the September 29 announcement included only limited dental coverage. The notation on the insurance claim returned to Mr. Stephens, which the Stephens Group interprets to mean that benefits were denied because Mr. Stephens had been furloughed, in fact states only that benefits were being denied because "the self-funded dental benefit plan for Continental Airlines employees was cancelled." Mr. Stephens' insurance claim thus was denied solely because of the change in coverage, and nothing in the September 29 mailgram or the notation on his insurance claim suggests otherwise.

2) Continental Affirmatively Encouraged Pilots To Return To Work

In order to counter the undisputed evidence that the suspension of service was meant to be only temporary, the O'Neill Group argues that the impact on the pilots was not temporary, because of the drastic reduction in force following the shutdown and the imposition of the emergency work rules. The evidence is undisputed, however that Continental did everything it could to build back its operations after the shutdown as quickly as possible. Upon filing its petitions for reorganization, Continental immediately went on a campaign to get the remaining pilots to agree to fly under the emergency work rules. The major obstacle Continental faced was ALPA's October 1, 1983 strike. To counter that

strike, Continental maintained a telephone bank from which pilots were called and requested to fly, made a strenuous effort to get striking pilots to return to service, and delayed hiring replacement pilots until it felt it had to do so to service its reexpanding route system. It was the pilot strike that significantly restricted Continental's ability to expand and prolonged the time that pilots were inactive.

Beginning on the date of the strike, Continental's flight schedules were largely determined by the availability of sufficient numbers of pilots. Having deliberately withheld their services from Continental, knowing full well that the company had jobs waiting for them should they return, it is disingenuous for those same striking pilots now to contend that their failure to return to work is evidence that they were furloughed and therefore entitled to up to five months' pay during the time they were on strike.

3) The Contractual Provision Did Not Apply To Temporary Shutdown

The Red Book set forth an elaborate and comprehensive set of procedures to handle furloughs, but did not define the term. Section 23, entitled "Reduction in Force, Furlough and Recall," was comprised of four subparts. Part 1 prescribed the procedures to be followed in a reduction in force, including the posting of a notice of "any reduction in force in crew complement at any base/sub-base" stating the reason, number, location, status, and effective date of any reduction. This notice would call for a new system-wide bid for the number of positions and regular lines of flight time remaining after the reduction, and would state the closing date for such new bid at least 30 days after the posting. Pilots affected by the reduction in force were given the right to "displace any pilot junior to them at any base/sub-base in any

status." Part 2 of the Section 23, which set forth the notice requirements and consequences of a pilot base or sub-base closing, is not relevant here because no bases were closed.

Part 3 was entitled "Furlough Rules" and mandated a 30-day written notice of a furlough and described the furloughees' recall rights and responsibilities. For example, pilots recalled from furlough had 30 days from the date of recall in which to report to work, were entitled to certain extended past privileges while on furlough, and could exercise their seniority bidding rights upon recall to bases where "vacancies which necessitated the recalls" existed. Part 4 provided for furlough pay in amounts ranging from one-half month to five months pay, depending on length of service when "a pilot is placed on furlough status."

The Stephens and O'Neill Groups contend that a "furlough" is ordinarily understood to mean a temporary loss of work, that Continental's three-day suspension of operations was such a temporary loss of work, and therefore that the three day suspension constituted a furlough. The argument fails for several reasons.

First, the ALPA contract itself expressly contemplated the possibility that flights would be cancelled, and hence that pilots would occasionally find themselves temporarily without work. Section 3, Part 6 of the Red Book anticipated the possibility of flight cancellations due to holidays, schedule changes, weather or mechanical problems. It guaranteed pilots their pay for trips missed due to these sorts of cancellations in certain circumstances. Section 25, Part 2 anticipated the possibility that pilots would "lose[ ] flying time" from their regular schedules because of cancellations other than those described in Section 3, or "through no fault of [their] own." Plainly, the Red Book did not contemplate that a temporary cancellation of flights would constitute a furlough, but

rather provided a separate contractual means of dealing with such occurrences. The very existence of contract provisions recognizing the possibility of cancellations in flight operations contravenes the O'Neill and Stephens Groups' insistence that any suspension of flight time is a furlough.

Second, the pilots' contention ignores the fact that relatively few pilots were affected at all by the three-day suspension. Unlike most management, clerical, and maintenance employees who were in fact furloughed, pilots do not work normal five-day week, four-week month schedules. As the evidence in the hearing on Continental's Motion to Reject showed, pilots ordinarily were on duty an average of only 14-16 days per month, and many trip schedules allowed for 17-21 days off during the month. Most pilots would have completed all of their flying duties for the month by September 24, and of those that had not, many would not have had a flight scheduled during the three days that the company was shutdown. Thus, the number of pilots who in fact temporarily lost work as a result of Continental's short suspension of service is relatively few. The flight schedules and work patterns of pilots would have made a furlough of the entire pilot workforce unnecessary.

The Bankruptcy Court correctly concluded that Section 23's furlough scheme could not logically apply to the situation at hand. To require Continental to pay up to five months compensation for the temporary shutdown of operations that occurred on September 24, 1983 would indeed provide a windfall to pilots who were in no meaningful sense furloughees at all. As the Bankruptcy Court explained, if a brief company-wide suspension of service activates the furlough pay provision, as claimed by the pilot groups, then the entire pilot workforce would receive double pay for up to five months even though each individual pilot might

have missed only a few or even no flights during the few days of the suspension of operations.

B. The Bankruptcy Court Was Correct In Holding That There Were No Disputed Issues Of Material Fact And That Summary Judgment Should Be Granted.

In accordance with Bankruptcy Rule 7056(c), Continental submitted evidence that demonstrated to the Bankruptcy Court that no controversy existed as to any material fact concerning appellants' furlough pay claims. Based on this competent and undisputed evidence, the Bankruptcy Court correctly determined that the temporary suspension of operations on September 24 was not a furlough.

Both pilot groups argue that the Bankruptcy Court's summary judgment order must be reversed because the testimony and documentation submitted by Continental in support of its motion does not meet the requirements of Bankruptcy Rule 7056(c). That Rule provides that summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law."

Continental supported its motion with competent summary judgment evidence consisting of the findings and conclusions of the Bankruptcy Court in prior proceedings and uncontested testimony identified by the witness' name and the prior proceeding — the Motion to Dismiss or Motion to Reject hearings — in which the testimony was given. These witnesses testified in open court, under oath, and were subject to cross examination by ALPA counsel. Continental's documentary evidence in support

of this motion was identified by exhibit number and the hearing at which it was admitted into evidence.

The Stephens Group erroneously asserts that Continental relied entirely on unsworn statements in its moving papers, and that such averments do not constitute competent summary judgment evidence. This Court is of the opinion that the Bankruptcy Court correctly used the court testimony and admitted exhibits to arrive at its decision.

In its Order disallowing claims for furlough pay, the Bankruptcy Court took judicial notice of the evidentiary record in the Continental bankruptcy proceeding as a whole. A court may "take judicial notice . . . of its own records and files, and facts which are part of its public records . . . . Judicial notice is particularly applicable to the court's own records of prior litigation closely related to the case before it." St. Louis Baptist Temple, Inc. v. FDIC, 605 F.2d 1169, 1172 (10th Cir. 1979); In re Saco Local Development Corp., 30 Bankr. 862 (Bankr. D. Me. 1983); In re Leach, 35 Bankr. 100 (Bankr W.D. Ky. 1983).

C. The Bankruptcy Court Correctly Estimated The Pilots' Furlough pay Claims At Zero Value Under 11 U.S.C. 502(c)

In addition to granting summary judgment, the Bankruptcy Court estimated the furlough pay claims to have zero value pursuant to Section 502(c) of the Bankruptcy Code, 11 U.S.C. 502(c), which provides as follows:

> There shall be estimated for purpose of allowance under this section —

(a) any contingent or unliquidated claim, the fixing or liquidation of which, as the case may be, would unduly delay the administration of the case; or

(b) any right to payment arising from a right to an equitable remedy for breach of performance.

The O'Neill and Stephens Groups challenge the appropriateness of estimation in this context. The O'Neill Group argues that the use of the estimation process was inappropriate because the furlough pay claims could have been liquidated without undue delay.

Besides ignoring the fact that Continental also requested and was granted summary judgment, the O'Neill Group has failed to recognize the enormous task which faced the Bankruptcy Court, Continental, and its creditors in adjudicating the labor claims. Over 13,000 employee claimants filed claims totalling approximately $3.9 billion. The furlough pay claims constituted only a small portion of this total. Because of the size of the labor claims, the large number of claimants, and the inordinate length of time that resolution of these claims would have otherwise required, the estimation process authorized by 11 U.S.C. 502(c) provided an appropriate means by which Continental could proceed expeditiously to confirmation of its reorganization plan in the event summary judgment on its motions was denied. See In re Continental Airlines Corp., 57 Bankr. 845 (Bankr. S.D. Tex. 1985).

The O'Neill Group asserts that liquidation of the furlough pay claims could have been accomplished expeditiously, but there are several flaws in that assertion. First, there was no principled way

of separating out one class of claims — for example, the furlough pay claims — from the rest of the employee claims in order to value the furlough pay claims on an individual claim by claim basis. Second, approximately 1069 pilots (including the Stephens and O'Neill Groups) filed claims for furlough pay. Had their claims not been subject to the estimation process, the Bankruptcy Court would have had to hold individual hearings on each claim to determine whether any furlough pay was due. The fact-finding alone would have been inordinately time-consuming and burdensome. For example, by September 24, 1983 many pilots had already completed their scheduled flying for the month of September, so the temporary shutdown did not affect them at all. Others may have been on leave or declined requests to return to work when contacted by Continental. The status and remaining work schedules in September of each individual claimant would have to have been established through testimony and documentary evidence before the bankruptcy judge could evaluate each claim. The liquidation of these claims would undoubtedly have delayed the confirmation of Continental's reorganization plan to the detriment of all other creditors.

Finally, both the Stephens and O'Neill Groups argue that it is inappropriate for the Court to estimate claims at zero value because such a valuation would be the equivalent of disallowing a claim. Estimation of the furlough pay claim at zero is an alternative to disallowance of the claim. Unless such estimation constitutes an abuse of discretion, it cannot be disturbed on appeal. In re Brints Cotton Marketing, Inc., 737 F.2d 1338, 1341 (5th Cir. 1984). It was entirely appropriate for the Bankruptcy Court to use estimation in this manner so as to avoid undue delay in the administration of this case.

D. Judge Roberts' Communications With Continental's Legal Counsel Concerning Employment Opportunities Should Not Result In The Bankruptcy Court's June 27, 1986 Order Being Vacated

Additionally, the pilot groups' allegations of impropriety on the part of Bankruptcy Judge Roberts provide no basis whatsoever for vacating his Order disallowing claims for furlough pay. The O'Neill Group's own recitation of the facts in its motion for withdrawal of the reference belies its attempts to cast his actions in a negative light. The evidence shows that Judge Roberts was not even approached to discuss the possibility of employment with a law firm representing Continental until after he had issued the ruling at issue in this appeal. There simply is no basis for the O'Neill Group's allegation of an "appearance of impropriety," and its attempt to obtain reversal on that ground is without merit.

III. CONCLUSION

A grant of summary judgment under Bankruptcy Rule 7056 and Fed. R. Civ. P. 56(c) shall be affirmed if there is no genuine issue of material fact in dispute and if the party moving for summary judgment is entitled to prevail on the undisputed material facts as a matter of law. City of Madison v. Bear Creek Water Assoc., Inc., 816 F.2d 1057, 1059 (5th Cir. 1987); In re Stuerke, 61 Bankr. 623, 625 (9th Cir. BAP 1986). A Bankruptcy Court's estimation of value of an unliquidated and contingent claim under 11 U.S.C. 502(c) may be disturbed on appellate review only in the event of an abuse of discretion. In re Brints Cotton Marketing, Inc., 737 F.2d 1338, 1341 (5th Cir. 1984). The evidence demonstrates that the Bankruptcy Court had ample grounds for denying the pilots' furlough pay claims and therefore summary judgment was war-

ranted. Additionally, it was appropriate for the Bankruptcy Court to estimate the furlough pay claims at zero. Therefore, it is

ORDERED that the Bankruptcy Court's June 27, 1986 Order granting Continental's Motion for Summary Judgment Disallowing and Estimating at Zero the Pay Claims Filed by Individual Continental Pilots is hereby AFFIRMED.

SIGNED at Houston, Texas this _____ day of _____, 1989.

/s/ John V. Singleton, Jr.
JOHN V. SINGLETON, JR.
UNITED STATES DISTRICT JUDGE

APPENDIX G

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 89-2347

In re CONTINENTAL AIRLINES CORP., Et Al., Debtors.

AIRLINE PILOTS ASSOCIATION INTERNATIONAL and James C. Stephens, Et Al., Appellants,

v.

CONTINENTAL AIRLINES, INC., Et Al., Appellees.

U.S. COURT OF APPEALS
FILED
OCT 29 1990
GILBERT E. GANUCHEAU
CLERK

O'NEILL GROUP, Appellants,

v.

CONTINENTAL AIRLINES, INC., Et Al., Appellees

UNION OF FLIGHT ATTENDANTS, Appellant,

v.

CONTINENTAL AIRLINES, INC., Et Al., Appellees.

Appeal from the United States District Court
for the Southern District of Texas

ON PETITION FOR REHEARING AND SUGGESTIONS FOR REHEARING EN BANC

(Opinion 5-25-90, 5 Cir., 198_, _____ F.2d _____)
(OCTOBER 29, 1990)

Before GEE, REAVLEY and GARWOOD, Circuit Judges.

PER CURIAM:

(x) The Petitions for Rehearing are DENIED and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Federal Rules of Appellate Procedure and Local Rule 35), the Suggestions for Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

/s/ Thomas Gibbs Gee
United States Circuit Judge

CLERK'S NOTE:
SEE FRAP AND LOCAL RULES 41 FOR STAY OF THE MANDATE.

APPENDIX H

APPENDIX H

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 89-2943

IN THE MATTER OF: CONTINENTAL AIRLINES, ET AL.,

Debtors.

Joseph E. O'NEILL, et al.,

Appellants,

v.

CONTINENTAL AIRLINES, INC.,

Appellee.

Appeals from the United States District Court
for the Southern District of Texas

(March 21, 1991)

BEFORE BROWN, POLITZ, and JOHNSON, Circuit Judges.

PER CURIAM:

This case arises out of a bankruptcy proceeding filed by Continental Airlines, Inc. (Continental), on September 24, 1983 (hereafter "the 1983 bankruptcy proceedings"), in the United States Bankruptcy Court for the Southern District of Texas. Two

groups of pilot-employees of Continental appeal the district court's dismissal of their proofs of claim for furlough pay they contend Continental owes them because of a temporary work stoppage which took place around the time of the 1983 bankruptcy petition. On December 3, 1990, Continental filed a second Chapter 11 bankruptcy (hereafter "the 1990 bankruptcy proceedings"), which stayed all judicial actions against the airline by operation of 11 U.S.C. § 362(a). For the reasons stated below, we issued an Order on March 15, 1991, holding that the present appeal is stayed in light of § 362(a) and the 1990 bankruptcy proceedings (see Appendix). We set forth our reasons below.

Facts and Procedural Background

At 5:00 p.m. on September 24, 1983, Continental suspended its entire domestic air passenger service and a portion of its international operations. One and one-half hours later, the airline filed for protection from creditors under the Chapter 11 reorganization provisions of title 11 of the United States Bankruptcy Code. See 28 U.S.C. §§ 1101-1174. On September 27, the airline reopened portions of its domestic service, using substantially fewer pilots than it had employed prior to filing for bankruptcy. Continental cut recalled pilots' salaries by 50 percent or more and significantly reduced their benefits.

Before the April 30, 1985, bar date to file employee-related claims, and relying upon provisions in the collective bargaining agreement between the Airline Pilots Association (ALPA) and the airline, a number of Continental pilots filed individual proofs of claim with the bankruptcy court for furlough pay totalling $32.6 million they contended they were owed as a result of the September 1983 shutdown. With the bankruptcy court's approval, Continental filed motions for summary judgment disposal of a variety of employee-related claims, including furlough pay claims filed by

the individual pilots. ALPA opposed the motion in the pilots' behalf. The court allowed the Stephens and O'Neill Groups, which organized to pursue these claims separately from the union and which include all of the pilot claimants, the opportunity to file their own oppositions. On June 27, 1986, the bankruptcy court granted Continental's motion for summary judgment dismissing the pilots' claims.

On July 7, 1986, the Stephens and O'Neill Groups jointly filed a Notice of Appeal from the June 27 Order to the district court. On December 3, 1987, the district court dismissed the appeal from the bankruptcy court for the pilots' groups' failure to file briefs within the time specified. However, on March 13, 1989, the court granted the two groups' motions to reinstate their appeals. On August 4, 1989, the district court, Singleton, J., issued a memorandum opinion affirming the bankruptcy court's order in all respects. The O'Neill and Stephens Groups perfected their appeal to this Court on August 4, 1989, and oral argument was heard in the case on September 14, 1990. On December 3, 1990, before the Court had rendered its decision in this case, Continental again filed Chapter 11 bankruptcy proceedings, this time in the Delaware bankruptcy court. The parties to this appeal thereafter briefed the court on the question whether the § 362(a) automatic stay provision applies here.

Automatic Stay of the Appeal

Section 362 of title 11 of the Bankruptcy Code provides:

> (a) Except as provided in subsection (b) of this section, a petition filed under section 301, 302, or 303 of this title . . . operates as a stay, applicable to all entities, of—

> (1) the commencement or continuation, including the issuance or employment of process, of a judicial, administrative, or other action or proceeding against the debtor that was or could have been commenced before the commencement of the case under this title, or to recover a claim against the debtor that arose before the commencement of the case under this title; . . .

11 U.S.C. § 362 (emphasis added). Continental contends that this provision stays the present appeal of the pilots' claims against the airline for furlough pay until the current 1990 bankruptcy proceedings, which the airline voluntarily instituted in the Delaware court, are resolved. The pilots counter that the stay does not apply to this proceeding because it is a claim filed in response to Continental's 1983 Chapter 11 bankruptcy and therefore had its genesis in a voluntary initiation of proceedings by the debtor rather than against it. By Order issued March 15, 1991, we held that the § 362(a) stay applies, and state our reasons herein.

This appeal from the district court decision denying the pilots' claim that they are entitled to furlough pay for the three-day work stoppage is certainly the continuation of a judicial proceeding. Therefore, we need only resolve whether this proceeding is "against the debtor." See Freeman v. Commissioner of Internal Revenue, 799 F.2d 1091, 1092-93 (5th Cir. 1986). In Freeman, this Court held that the answer to the question whether a suit is against the debtor and is stayed by § 362(a) "is determined from an examination of the posture of the case at the initial proceeding." Id. at 1093; see also Cathey v. Johns-Manville Sales Corp., 711 F.2d 60, 61-62 (6th Cir. 1983). In the O'Neill and Stephens Groups' view, the initial "judicial . . . proceeding . . . commenced" on Setember 24, 1983, when Continental filed a chapter 11 peti-

tion for reorganization; thus, this proceeding, they argue, should be deemed initiated by the debtor.

We disagree. While it may be true that this appeal is linked to the 1983 bankruptcy proceedings, filed by Continental, proofs of claim to which the debtor objects, including this one, are undoubtedly "against the debtor" in the context of § 362(a)(1). This case is different from Freeman, upon which the O'Neill and Stephens Groups rely so heavily. We determined that § 362(a) did not stay that case, a petition for redetermination of federal income tax liability, because the proceedings were clearly begun by the debtor. 799 F.2d at 1093. In contrast, the dispute over the pilots' claim for furlough pay, initiated against Continental, is the subject of the litigation before us. As we stated in In re Simmons, 765 F.2d 547 (5th Cir. 1985), the filing of a proof of claim is analogous to the filing of a complaint in a civil action, with the bankrupt's objection the same as the answer. See id. at 552 (citing Nortex Trading Corp. v. Newfield, 311 F.2d 163, 164 (2d Cir. 1962)).[1]

Accordingly, we reject the pilots' contention that the present appeal is the continuation of a judicial proceeding initiated by the

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[1] The O'Neill and Stephens Groups argue that, because the Simmons language was adopted from a Second Circuit case decided under the now defunct Bankruptcy Act of 1898, this comparison of the proof of claim procedure to a civil case "can have no bearing here." The procedure for filing proofs of claim and objections did not change in any respect material here with the enactment of the current Bankruptcy Code in 1978, however, and the analogy is applicable to this case, as there would be no cause for appeal unless the creditor or equity security holder took action against the debtor to share in the debtor's assets. Compare former 11 U.S.C. § 596 (1958) (repealed) with current 11 U.S.C. § 501 (1982).

debtor, and hold that the § 362(a) stay applies.[2] Only the Delaware bankruptcy court may grant relief from the effect of the automatic stay provision. See 11 U.S.C. § 362(d),(f). The parties are instructed to inform this Court in the event that the Delaware court grants such relief or if the stay lapses. Until we receive such information, all proceedings herein with respect to this appeal are stayed pursuant to the March 15, 1991, Order.

Appendix

(March 15, 1991)

BEFORE BROWN, POLITZ, and JOHNSON, Circuit Judges.

BY THE COURT:

ORDER

Pending before us is an appeal from a summary judgment order of the United States District Court for the Southern District of Texas, Singleton, J., affirming the Bankruptcy Court's grant of Continental's Motion for Summary Judgment against the appellants, the O'Neill and Stephens Groups of 1,069 pilot-employees of Continental (hereafter "Pilots"). Specifically, the Pilots' claims involved in this appeal are for furlough pay arising out the temporary shutdown of operations which occurred around the time

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[2] We likewise reject the pilots' alternative contention that the automatic stay cannot apply because the Delaware court cannot obtain jurisdiction over the pilots' claims, which rests exclusively in the Texas bankruptcy court. Although we foresee problems with transfer of the various claims remaining from the 1983 bankruptcy proceedings, and especially this claim, the broad dictates of § 362(a) nevertheless require that this appeal be stayed. We cannot escape the congressional mandate. See In re Tampa Chain, Inc., 835 F.2d 54 (2d Cir. 1987) (appeal of damages award against bankrupt defendant stayed as of date of filing of Chapter 13 petition).

of Continental's Chapter 11 bankruptcy filing on September 24, 1983.

Since that time, on December 3, 1990, Continental has instituted an entirely new Chapter 11 proceeding in the United States Bankruptcy Court for the District of Delaware (Balick, J.). Continental urges that this 1990 bankruptcy proceeding automatically stays the present appeal. 11 U.S.C. § 362(a). From the outset of the current Delaware filing, this Court has kept the Delaware Court fully informed of Continental's position, by sending photocopies of all briefs and memoranda regarding the automatic stay issue. Because the Delaware Court has thus far taken no position on whether the 1990 proceeding stays the instant appeal, the question is squarely before this Court.

For reasons we will subsequently file, the Court concludes that the present appeal is automatically stayed by operation of 11 U.S.C. § 362(a), in light of the current bankruptcy proceedings. Nothing in this Order shall be construed as a determination of the validity or legality of the Delaware bankruptcy proceedings, and, on the contrary, the Court assumes without deciding that such proceeding is valid and subsisting.

Of course, any party has the right to apply to the Delaware Bankruptcy Court for relief from the stay pursuant to 11 U.S.C. § 362(d).

APPENDIX I

APPENDIX I

UNITED STATES BANKRUPTCY COURT
DISTRICT OF DELAWARE

In re	
	No. 90-932
CONTINENTAL AIRLINES, INC., et al.,	
	Chapter 11
Debtor.	
JOSEPH E. O'NEILL, et al.,	Adversary No. ____
Movants,	
v.	MOTION FOR RELIEF FROM AUTOMATIC STAY
CONTINENTAL AIRLINES, INC., et al.,	
Respondents.	

Pursuant to 11 U.S.C. § 362(d), Joseph E. O'Neill, et al. ("The O'Neill Group", the "Stephens Group" and the Flight Attendants) request relief from the automatic stay imposed by 11 U.S.C. § 362(a) on the ground that modifying the automatic stay will promote judicial economy by allowing pending litigation to proceed to conclusion in another court. This motion is supported

by the petition and the following memorandum of points and authorities.

RESPECTFULLY SUBMITTED this 28th day of March, 1991.

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UNITED STATES BANKRUPTCY COURT
DISTRICT OF DELAWARE

In re	)	
	)	No. 90-932
CONTINENTAL AIRLINES, INC., et al.,	)	
	)	Chapter 11
Debtor.	)	
	)	
JOSEPH E. O'NEILL, et al.,	)	Adversary No. ____
	)	
Movants,	)	
	)	MEMORANDUM RE
v.	)	MOTION FOR RELIEF
	)	FROM AUTOMATIC
CONTINENTAL AIRLINES, INC., et al.,	)	STAY
	)	
Respondents.	)	

MEMORANDUM OF POINTS AND AUTHORITIES

I. Introduction.

This is Continental's second resort to Chapter 11 in little over seven years. The first case, filed in Houston, Texas in 1983, is still open and many unresolved claims and issues remain pending in the Texas courts. The purpose of this motion for stay relief is to allow one piece of that long-standing litigation to proceed to conclusion.

II. Continental's First Bankruptcy Is Still Pending.

Continental filed its first Chapter 11 in Houston, Texas on September 24, 1983, primarily to escape its collective bargaining agreements with its pilots, flight attendants and machinists.[1] Continental filed motions to reject those contracts simultaneously upon filing its chapter 11 case and unilaterally modified of the terms of those contracts by imposing new wage scales of approximately one-half the pay required by the negotiated contracts. After the bankruptcy court authorized rejection of the collective bargaining agreements in 1984, the unions filed claims for their damages arising from the rejection of their contracts.[2]

The pilots' claims for contract rejection damages were denied by the bankruptcy court on summary judgment. Most of that ruling was affirmed by the Fifth Circuit Court of Appeals, but a portion of the claim was remanded to the Houston bankruptcy court for a determination of when Continental would have ceased

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[1] The pilots were represented initially by their union, the Air Line Pilots Association ("ALPA"); the flight attendants were represented by their union, the Union of Flight Attendants ("UFA"); and the machinists were represented by the International Aerospace Machinists ("IAM").

[2] After ALPA settled with Continental in late 1985, the bankruptcy court authorized the pilots individually to intervene to pursue their claims that had previously been handled by ALPA. *See In re Continental Airlines Corp.*, 907 F.2d 1500, 1505 (5th Cir. 1990). A group of approximately 394 pilots who did so and were represented by Lewis and Roca became known as The O'Neill Group. Another group of approximately 88 pilots become known as the Stephens Group. On appeal to the Fifth Circuit, the O'Neill Group also included approximately 17 flight attendants, who had previously been represented by the UFA but who intervened on their own behalf after the UFA settled with Continental in much the same fashion as the ALPA settlement. For litigation beyond the Fifth Circuit level, the Stephens Group joined the O'Neill Group. Stay relief is sought here on behalf of all remaining claimants for contract rejection damages, which are collectively referred to as the O'Neill Group in this motion.

doing business absent rejection of the collective bargaining agreements. *In re Continental Airlines Corp.*, 901 F.2d 1259 (5th Cir. 1990), *rehearing denied*, 918 F.2d 177 (5th Cir. 1990). The O'Neill Group intends to petition the U.S. Supreme Court for certiorari, and an extension of time for doing so was granted to March 28, 1991.

In connection with another appeal that was awaiting decision by the Fifth Circuit when this bankruptcy case was filed, the Fifth Circuit has concluded that the automatic stay arising from this case applies to that appeal. See Exhibit 1 attached hereto. We assume the Fifth Circuit would reach the same conclusion with respect to the contract rejection damages claim. Although such application of the automatic stay also means that the time for petitioning for certiorari is extended by virtue of 11 U.S.C. § 108(c), the O'Neill Group moves for relief from the automatic stay so that litigation can be concluded.

III. Stay Relief Is Appropriate.

Section 362(d) states that the court shall grant relief from the automatic stay "for cause." Relief may include "terminating, annulling, modifying, or conditioning" the stay. 11 U.S.C. § 362(d). The Bankruptcy Code does not clearly define "for cause" and consequently the meaning must be determined on a case by case basis. *In re Tucson Estates, Inc.*, 912 F.2d 1162, 1166 (9th Cir. 1990).

One common cause for lifting the automatic stay is to permit pending litigation to proceed in another court in the interests of judicial economy, where "the liquidation of a claim may be more conveniently and speedily determined in another forum." 2 *Collier on Bankruptcy* ¶ 362.07, at 362-65 (15th ed. 1990). Congress

has granted broad discretion to the bankruptcy courts in deciding whether to grant relief from the automatic stay, *In re Clinton Centrifuge, Inc.*, 81 B.R. 844, 850 (Bankr. E.D. Pa. 1988), since "it will often be more appropriate to permit proceedings to continue in their place of origin, when no great prejudice to the bankruptcy estate would result, in order to leave the parties to their chosen forum and to relieve the bankruptcy court from many duties that may be handled elsewhere." *Id.* at 850, *quoting U.S. Code Cong. & Admin. News* 1978, pp. 5787, 5836, 6297.

In *Clinton Centrifuge*, a corporation sought relief from the automatic stay to include a Chapter 11 debtor as a defendant in a state court action for breach of contract. The court recognized that judicial economy was a sufficient basis for granting relief from an automatic stay, but denied the motion to lift stay. The court noted that the stayed matter was not pending prior to the bankruptcy filing, and would not be expeditiously resolved in the non-bankruptcy forum. Therefore, considerations of judicial economy did not outweigh other factors, primarily the desirability of resolving all claims against the debtor in one forum to facilitate the administration of the case. 81 B.R. at 850.

The court in *In re Philadelphia Athletic Club, Inc.* 9 B.R. 280, 282 (Bankr. E.D. Pa. 1981), applied the same principles and granted relief from the automatic stay. The plaintiff sought relief from the automatic stay in order to continue a state court action to recover money from a Chapter 11 debtor for services rendered. The state court action had been pending for several years and was almost complete. The court agreed with the plaintiff's contention that to require that the suit be litigated again in the bankruptcy court would be "unduly repetitive, expensive and time consuming," and "clearly . . . a waste of judicial and legal time and effort."

These cases support relief being granted here. The litigation for which relief is sought has been pending in other courts since 1984. It would be a vast waste of judicial resources not to conclude that litigation at the Supreme Court level, and there is no reason to delay further in doing so.[3]

Section 362(g) provides that the party opposing relief from the automatic stay has the burden of proof on all issues except the debtor's equity in property. Once cause is shown by the party requesting relief, § 362(g) places the burden of proof on the debtor. 2 *Collier on Bankruptcy* ¶ 362.10, at 362-76 (15th ed. 1990). *In re Stranahan Gear Company, Inc.*, 67 B.R. 834 (Bankr. E.D. Pa. 1986). Here, the debtor cannot meet a burden of showing that the pending litigation arising out of its prior bankruptcy should not be concluded where pending. Stay relief should be granted so the contract rejection damages claims arising from the first bankruptcy case can be concluded, hopefully before this new case reaches the plan stage.

IV. Litigation Arising From the First Bankruptcy Should Proceed As Scheduled.

There is a further reason why stay relief is particularly appropriate for claims arising from Continental's first bankruptcy case. Continental's first chapter 11 case remains pending in Texas. Moreover, Continental's confirmed Plan expressly provided in Article 54.1 that the Texas court "shall retain and have exclusive jurisdiction . . . to determine any and all objections to the allowance of Claims [and] to determine any and all applications,

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[3] This motion is filed without prejudice to seeking a change of venue, dismissal of this case or asserting lack of jurisdiction in this Court.

adversary proceedings and contested or litigated matters that may be pending on the Effective Date."

The law is clear that such retention of jurisdiction under a confirmed plan precludes any subsequent bankruptcy court from exercising any jurisdiction over such claims, notwithstanding a successive filing. *In re Colony Square Company*, 779 F.2d 653, 655 (11th Cir. 1986); *In re Colony Square Company*, 788 F.2d 739 (11th Cir. 1986); *Prudential Insurance Company of America v. Colony Square Company*, 40 B.R. 603, 606-07 (Bankr. N.D. Ga. 1984), *aff'd*, 62 B.R. 48 (N.D. Ga. 1985); *Prudential Insurance Company of America v. Colony Square Company*, 29 B.R. 432, 436-37 (W.D. Pa. 1983). To avoid a legal vacuum, all the litigation arising from Continental's first chapter 11 case should be allowed to proceed in the courts where it is pending, and this court should lift the automatic stay so that such other courts having proper jurisdiction are not stayed from proceeding.

WHEREFORE, The O'Neill Group respectfully requests relief from the automatic stay imposed by 11 U.S.C. § 362(a) to

allow it to proceed with the litigation of the contract rejection damages claims arising from Continental's first bankruptcy case.

RESPECTFULLY SUBMITTED this 28th day of March, 1990.

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IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 89-2943

U.S. COURT OF APPEALS
FILED
MAR 15 1991
GILBERT E. GANUCHEAU
CLERK

Joseph E. O'NEILL, et al.,

Appellants,

v.

CONTINENTAL AIRLINES, INC.,

Appellee.

Appeals from the United States District Court
for the Southern District of Texas

(March 15, 1991)

BEFORE BROWN, POLITZ, and JOHNSON, Circuit Judges.

BY THE COURT:

ORDER

Pending before us is an appeal from a summary judgment order of the United States District Court for the Southern District of Texas, Singleton, J., affirming the Bankruptcy Court's grant of Continental's Motion for Summary Judgment against the appellants, the O'Neill and Stephens Groups of 1,069 pilot-employees of Continental (hereafter "Pilots"). Specifically, the Pilots' claims involved in this appeal are for furlough pay arising out the temporary shutdown of operations which occurred around the time

of Continental's Chapter 11 bankruptcy filing on September 24, 1983.

Since that time, on December 3, 1990, Continental has instituted an entirely new Chapter 11 proceeding in the United States Bankruptcy Court for the District of Delaware (Balick, J.). Continental urges that this 1990 bankruptcy proceeding automatically stays the present appeal. 11 U.S.C. § 362(a). From the outset of the current Delaware filing, this Court has kept the Delaware Court fully informed of Continental's position, by sending photocopies of all briefs and memoranda regarding the automatic stay issue. Because the Delaware Court has thus far taken no position on whether the 1990 proceeding stays the instant appeal, the question is squarely before this Court.

For reasons we will subsequently file, the Court concludes that the present appeal is automatically stayed by operation of 11 U.S.C. § 362(a), in light of the current bankruptcy proceedings. Nothing in this Order shall be construed as a determination of the validity or legality of the Delaware bankruptcy proceedings, and, on the contrary, the Court assumes without deciding that such proceeding is valid and subsisting.

Of course, any party has the right to apply to the Delaware Bankruptcy Court for relief from the stay pursuant to 11 U.S.C. § 362(d).

APPENDIX J

APPENDIX J

IN THE UNITED STATES BANKRUPTCY COURT FOR THE DISTRICT OF DELAWARE

IN RE	)	
	)	
CONTINENTAL AIRLINES, INC., et al.,	)	Case No. 90-932
	)	
Debtors,	)	Motion No. M-91-74
	)	
JOSEPH E. O'NEILL, et al.,	)	
	)	
Movants,	)	
	)	
v.	)	
	)	
CONTINENTAL AIRLINES, INC., et al.,	)	
	)	
Respondents.	)	

ORDER

AND NOW, this 12th day of May, 1992, upon consideration of the Motion of Joseph E. O'Neill, et al. (the "O'Neill Group") for Relief from the Automatic Stay to proceed with pending litigation and the Answer of Continental Airlines, Inc. in opposition thereto,

IT IS ORDERED THAT the Motion is GRANTED IN PART and that the automatic stay is lifted for the limited purpose of

(1) allowing the O'Neill Group to file a Petition for Writ of Certiorari with the Supreme Court of the United States to seek review of the Order of the United States Court of Appeals for the Fifth Circuit dated March 15, 1991 in Joseph E. O'Neill, et al. v. Continental Airlines, Inc., No. 89-[2347]; and (2) allowing the parties to file briefs relating to that Petition.

For the purpose of 11 U.S.C. § 108(c), notice of this relief shall be deemed given upon entry of this Order upon the docket of this case. To the extent that the Motion seeks relief from the automatic stay to brief and argue any appeal to the Supreme Court or litigate any remand from any court which has been or may be directed, the Motion is DENIED WITHOUT PREJUDICE and may be renewed following the determination by the United States Supreme Court of the O'Neill Group's Petition for Writ of Certiorari.

/s/ Helen S. Balick
U.S. Bankruptcy Judge

APPENDIX K

APPENDIX K

11 U.S.C. § 365

§ 365. Executory contracts and unexpired leases.

(a) Except as provided in sections 765 and 766 of this title and in subsections (b), (c), and (d) of this section, the trustee, subject to the court's approval, may assume or reject any executory contract or unexpired lease of the debtor.

(b) (1) If there has been a default in an executory contract or unexpired lease of the debtor, the trustee may not assume such contract or lease unless, at the time of assumption of such contract or lease, the trustee—

(A) cures, or provides adequate assurance that the trustee will promptly cure, such default;

(B) compensates, or provides adequate assurance that the trustee will promptly compensate, a party other than the debtor to such contract or lease, for any actual pecuniary loss to such party resulting from such default; and

(C) provides adequate assurance of future performance under such contract or lease.

(2) Paragraph (1) of this subsection does not apply to a default that is a breach of a provision relating to—

(A) the insolvency or financial condition of the debtor at any time before the closing of the case;

(B) the commencement of a case under this title; or

(C) the appointment of or taking possession by a trustee in a case under this title or a custodian before such commencement.

(3) For the purposes of paragraph (1) of this subsection and paragraph (2)(B) of subsection (f), adequate assurance of future performance of a lease of real property in a shopping center includes adequate assurance—

(A) of the source of rent and other consideration due under such lease, and in the case of an assignment, that the financial condition and operating performance of the proposed assignee and its guarantors, if any, shall be similar to the financial condition and operating performance of the debtor and its guarantors, if any, as of the time the debtor became the lessee under the lease;

(B) that any percentage rent due under such lease will not decline substantially;

(C) that assumption or assignment of such lease is subject to all the provisions thereof, including (but not limited to) provisions such as a radius, location, use, or exclusivity provision, and will not breach any such provision contained in any other lease, financing agreement, or master agreement relating to such shopping center; and

(D) that assumption or assignment of such lease will not disrupt any tenant mix or balance in such shopping center.

(4) Notwithstanding any other provision of this section, if there has been a default in an unexpired lease of the debtor, other than a default of a kind specified in paragraph (2) of this subsection, the trustee may not require a lessor to provide services or supplies incidental to such lease before assumption of such lease unless the lessor is compensated under the terms of such lease for any services and supplies provided under such lease before assumption of such lease.

(c) The trustee may not assume or assign an executory contract or unexpired lease of the debtor, whether or not such contract or lease prohibits or restricts assignment of rights or delegation of duties, if—

(1)(A) applicable law excuses a party, other than the debtor, to such contract or lease from accepting performance from or rendering performance to an entity other than the debtor or the debtor in possession, whether or not such contract or lease prohibits or restricts assignment of rights or delegation of duties; and

(B) such party does not consent to such assumption or assignment; or

(2) such contract is a contract to make a loan, or extend other debt financing or financial accommodations, to or for the benefit of the debtor, or to issue a security of the debtor; or

(3) such lease is of nonresidential real property and has been terminated under applicable nonbankruptcy law prior to the order for relief.

(d)(1) In a case under chapter 7 of this title, if the trustee does not assume or reject an executory contract or unexpired lease of residential real property or of personal property of the debtor within 60 days after the order for relief, or within such additional time as the court, for cause, within such 60-day period, fixes, then such contract or lease is deemed rejected.

(2) In a case under chapter 9, 11, 12, or 13 of this title, the trustee may assume or reject an executory contract or unexpired lease of residential real property or of personal property of the debtor at any time before the confirmation of a plan but the court, on request of any party to such contract or lease, may order the trustee to determine within a specified period of time whether to assume or reject such contract or lease.

(3) The trustee shall timely perform all the obligations of the debtor, except those specified in section 365(b)(2), arising from and after the order for relief under any unexpired lease of nonresidential real property, until such lease is assumed or rejected, notwithstanding section 503(b)(1) of this title. The court may extend, for cause, the time for performance of any such obligation that arises within 60 days after the date of the order for relief, but the time for performance shall not be extended beyond such 60-day period. This subsection shall not be deemed to affect the trustee's obligations under the provisions of subsection (b) or (f) of this section. Acceptance of any such

performance does not constitute waiver or relinquishment of the lessor's rights under such lease or under this title.

(4) Notwithstanding paragraphs (1) and (2), in a case under any chapter of this title, if the trustee does not assume or reject an unexpired lease of nonresidential real property under which the debtor is the lessee within 60 days after the date of the order for relief, or within such additional time as the court, for cause, within such 60-day period, fixes, then such lease is deemed rejected, and the trustee shall immediately surrender such nonresidential real property to the lessor.

(e)(1) Notwithstanding a provision in an executory contract or unexpired lease, or in applicable law, an executory contract or unexpired lease of the debtor may not be terminated or modified, and any right or obligation under such contract or lease may not be terminated or modified, at any time after the commencement of the case solely because of a provision in such contract or lease that is conditioned on—

(A) the insolvency or financial condition of the debtor at any time before the closing of the case;

(B) the commencement of a case under this title; or

(C) the appointment of or taking possession by a trustee in a case under this title or a custodian before such commencement.

(2) Paragraph (1) of this subsection does not apply to an executory contract or unexpired lease of the debtor, whether

or not such contract or lease prohibits or restricts assignment of rights or delegation of duties, if—

(A) (i) applicable law excuses a party, other than the debtor, to such contract or lease from accepting performance from or rendering performance to the trustee or to an assignee of such contract or lease, whether or not such contract or lease prohibits or restricts assignment of rights or delegation of duties; and

(ii) such party does not consent to such assumption or assignment; or

(B) such contract is a contract to make a loan, or extend other debt financing or financial accommodations, to or for the benefit of the debtor, or to issue a security of the debtor.

(f) (1) Except as provided in subsection (c) of this section, notwithstanding a provision in an executory contract or unexpired lease of the debtor, or in applicable law, that prohibits, restricts, or conditions the assignment of such contract or lease, the trustee may assign such contract or lease under paragraph (2) of this subsection.

(2) The trustee may assign an executory contract or unexpired lease of the debtor only if—

(A) the trustee assumes such contract or lease in accordance with the provisions of this section; and

(B) adequate assurance of future performance by the assignee of such contract or lease is provided, whether or not there has been a default in such contract or lease.

(3) Notwithstanding a provision in an executory contract or unexpired lease of the debtor, or in applicable law that terminates or modifies, or permits a party other than the debtor to terminate or modify, such contract or lease or a right or obligation under such contract or lease on account of an assignment of such contract or lease, such contract, lease, right, or obligation may not be terminated or modified under such provision because of the assumption or assignment of such contract or lease by the trustee.

(g) Except as provided in subsections (h) (2) and (i) (2) of this section, the rejection of an executory contract or unexpired lease of the debtor constitutes a breach of such contract or lease—

(1) if such contract or lease has not been assumed under this section or under a plan confirmed under chapter 9, 11, 12, or 13 of this title, immediately before the date of the filing of the petition; or

(2) if such contract or lease has been assumed under this section or under a plan confirmed under chapter 9, 11, 12, or 13 of this title—

(A) if before such rejection the case has not been converted under section 1112, 1307, or 1208 of this title, at the time of such rejection; or

(B) if before such rejection the case has been converted under section 1112, 1307, or 1208 of this title—

(i) immediately before the date of such conversion, if such contract or lease was assumed before such conversion; or

(ii) at the time of such rejection, if such contract or lease was assumed after such conversion.

(h)(1) If the trustee rejects an unexpired lease of real property of the debtor under which the debtor is the lessor, or a timeshare interest under a timeshare plan under which the debtor is the timeshare interest seller, the lessee or timeshare interest purchaser under such lease or timeshare plan may treat such lease or timeshare plan as terminated by such rejection, where the disaffirmance by the trustee amounts to such a breach as would entitle the lessee or timeshare interest purchaser to treat such lease or timeshare plan as terminated by virtue of its own terms, applicable nonbankruptcy law, or other agreements the lessee or timeshare interest purchaser has made with other parties; or, in the alternative, the lessee or timeshare interest purchaser may remain in possession of the leasehold or timeshare interest under any lease or timeshare plan the term of which has commenced for the balance of such term and for any renewal or extension of such term that is enforceable by such lessee or timeshare interest purchaser under applicable nonbankruptcy law.

(2) If such lessee or timeshare interest purchaser remains in possession as provided in paragraph (1) of this subsection, such lessee or timeshare interest purchaser may offset against the rent reserved under such lease or moneys due for such timeshare interest for the balance of the term after the date of the rejection of such lease or timeshare interest, and any such renewal or extension thereof, any damages occurring after such date caused by the

nonperformance of any obligation of the debtor under such lease or timeshare plan after such date, but such lessee or timeshare interest purchaser does not have any rights against the estate on account of any damages arising after such date from such rejection, other than such offset.

(i)(1) If the trustee rejects an executory contract of the debtor for the sale of real property or for the sale of a timeshare interest under a timeshare plan, under which the purchaser is in possession, such purchaser may treat such contract as terminated, or, in the alternative, may remain in possession of such real property or timeshare interest.

(2) if such purchaser remains in possession—

(A) such purchaser shall continue to make all payments due under such contract, but may, offset against such payments any damages occurring after the date of the rejection of such contract caused by the non-performance of any obligation of the debtor after such date, but such purchaser does not have any rights against the estate on account of any damages arising after such date from such rejection, other than such offset; and

(B) the trustee shall deliver title to such purchaser in accordance with the provisions of such contract, but is relieved of all other obligations to perform under such contract.

(j) A purchaser that treats an executory contract as terminated under subsection (i) of this section, or a party whose executory contract to purchase real property from the debtor is rejected and under which such party is not in possession, has a lien on the in-

terest of the debtor in such property for the recovery of any portion of the purchase price that such purchaser or party has paid.

(k) Assignment by the trustee to an entity of a contract or lease assumed under this section relieves the trustee and the estate from any liability for any breach of such contract or lease occurring after such assignment.

(l) If an unexpired lease under which the debtor is the lessee is assigned pursuant to this section, the lessor of the property may require a deposit or other security for the performance of the debtor's obligations under the lease substantially the same as would have been required by the landlord upon the initial leasing to a similar tenant.

(m) For purposes of this section 365 and sections 541(b)(2) and 362(b)(10), leases of real property shall include any rental agreement to use real property.

(n)(1) If the trustee rejects an executory contract under which the debtor is a licensor of a right to intellectual property, the licensee under such contract may elect—

> (A) to treat such contract as terminated by such rejection if such rejection by the trustee amounts to such a breach as would entitle the licensee to treat such contract as terminated by virtue of its own terms, applicable nonbankruptcy law, or an agreement made by the licensee with another entity; or
>
> (B) to retain its rights (including a right to to [*sic*] enforce any exclusivity provision of such contract, but excluding any other right under applicable nonbankruptcy

law to specific performance of such contract) under such contract and under any agreement supplementary to such contract, to such intellectual property (including any embodiment of such intellectual property to the extent protected by applicable nonbankruptcy law), as such rights existed immediately before the case commenced, for—

(i) the duration of such contract; and

(ii) any period for which such contract may be extended by the licensee as of right under applicable nonbankruptcy law.

(2) If the licensee elects to retain its rights, as described in paragraph (1)(B) of this subsection, under such contract—

(A) the trustee shall allow the licensee to exercise such rights;

(B) the licensee shall make all royalty payments due under such contract for the duration of such contract and for any period described in paragraph (1)(B) of this subsection for which the licensee extends such contract; and

(C) the licensee shall be deemed to waive—

(i) any right of setoff it may have with respect to such contract under this title or applicable nonbankruptcy law; and

(ii) any claim allowable under section 503(b) of this title arising from the performance of such contract.

(3) If the licensee elects to retain its rights, as described in paragraph (1)(B) of this subsection, then on the written request of the licensee the trustee shall—

(A) to the extent provided in such contract, or any agreement supplementary to such contract, provide to the licensee any intellectual property (including such embodiment) held by the trustee; and

(B) not interfere with the rights of the licensee as provided in such contract, or any agreement supplementary to such contract, to such intellectual property (including such embodiment) including any right to obtain such intellectual property (or such embodiment) from another entity.

(4) Unless and until the trustee rejects such contract, on the written request of the licensee the trustee shall—

(A) to the extent provided in such contract or any agreement supplementary to such contract—

(i) perform such contract; or

(ii) provide to the licensee such intellectual property (including any embodiment of such intellectual property to the extent protected by applicable nonbankruptcy law) held by the trustee; and

(B) not interfere with the rights of the licensee as provided in such contract, or any agreement supplementary to such contract, to such intellectual property (including such embodiment), including any right

to obtain such intellectual property (or such embodiment) from another entity.

(o) In a case under chapter 11 of this title, the trustee shall be deemed to have assumed (consistent with the debtor's other obligations under section 507), and shall immediately cure any deficit under, any commitment by the debtor to the Federal Deposit Insurance Corporation, the Resolution Trust Corporation, the Director of the Office of Thrift Supervision, the Comptroller of the Currency, or the Board of Governors of the Federal Reserve System, or its predecessors or successors, to maintain the capital of an insured depository institution, and any claim for a subsequent breach of the obligations thereunder shall be entitled to priority under section 507. This subsection shall not extend any commitment that would otherwise be terminated by any act of such an agency.

11 U.S.C. § 502

§ 502. Allowance of claims or interests.

(a) A claim or interest, proof of which is filed under section 501 of this title, is deemed allowed, unless a party in interest, including a creditor of a general partner in a partnership that is a debtor in a case under chapter 7 of this title, objects.

(b) Except as provided in subsections (e)(2), (f), (g), (h) and (i) of this section, if such objection to a claim is made, the court, after notice and a hearing, shall determine the amount of such claim in lawful currency of the United States as of the date of the

filing of the petition, and shall allow such claim in such amount, except to the extent that—

(1) such claim is unenforceable against the debtor and property of the debtor, under any agreement or applicable law for a reason other than because such claim is contingent or unmatured;

(2) such claim is for unmatured interest;

(3) if such claim is for a tax assessed against property of the estate, such claim exceeds the value of the interest of the estate in such property;

(4) if such claim is for services of an insider or attorney of the debtor, such claim exceeds the reasonable value of such services;

(5) such claim is for a debt that is unmatured on the date of the filing of the petition and that is excepted from discharge under section 523(a)(5) of this title;

(6) if such claim is the claim of a lessor for damages resulting from the termination of a lease of real property, such claim exceeds—

(A) the rent reserved by such lease, without acceleration, for the greater of one year, or 15 percent, not to exceed three years, of the remaining term of such lease, following the earlier of—

(i) the date of the filing of the petition; and

(ii) the date on which such lessor repossessed, or the lessee surrendered, the leased property; plus

(B) any unpaid rent due under such lease, without acceleration, on the earlier of such dates;

(7) if such claim is the claim of an employee for damages resulting from the termination of an employment contract, such claim exceeds—

(A) the compensation provided by such contract, without acceleration, for one year following the earlier of—

(i) the date of the filing of the petition; or

(ii) the date on which the employer directed the employee to terminate, or such employee terminated, performance under such contract; plus

(B) any unpaid compensation due under such contract, without acceleration, on the earlier of such dates; or

(8) such claim results from a reduction, due to late payment, in the amount of an otherwise applicable credit available to the debtor in connection with an employment tax on wages, salaries, or commissions earned from the debtor.

(c) There shall be estimated for purpose of allowance under this section—

(1) any contingent or unliquidated claim, the fixing or liquidation of which, as the case may be, would unduly delay the administration of the case; or

(2) any right to payment arising from a right to an equitable remedy for breach of performance.

(d) Notwithstanding subsections (a) and (b) of this section, the court shall disallow any claim of any entity from which property is recoverable under section 542, 543, 550, or 553 of this title or that is a transferee of a transfer avoidable under section 522(f), 522(h), 544, 545, 547, 548, 549, or 724(a) of this title, unless such entity or transferee has paid the amount, or turned over any such property, for which such entity or transferee is liable under section 522(i), 542, 543, 550, or 553 of this title.

(e)(1) Notwithstanding subsections (a), (b), and (c) of this section and paragraph (2) of this subsection, the court shall disallow any claim for reimbursement or contribution of an entity that is liable with the debtor on or has secured the claim of a creditor, to the extent that—

(A) such creditor's claim against the estate is disallowed;

(B) such claim for reimbursement or contribution is contingent as of the time of allowance or disallowance of such claim for reimbursement or contribution; or

(C) such entity asserts a right of subrogation to the rights of such creditor under section 509 of this title.

(2) A claim for reimbursement or contribution of such an entity that becomes fixed after the commencement of the case shall be determined, and shall be allowed under subsection (a), (b), or (c) of this section, or disallowed under subsection (d) of this section, the same as if such claim had become fixed before the date of filing of the petition.

(f) In an involuntary case, a claim arising in the ordinary course of the debtor's business or financial affairs after the commencement of the case but before the earlier of the appointment of a trustee and the order for relief shall be determined as of the date such claim arises, and shall be allowed under subsection (a), (b), or (c) of this section or disallowed under subsection (d) or (e) of this section, the same as if such claim had arisen before the date of the filing of the petition.

(g) A claim arising from the rejection, under section 365 of this title or under a plan under chapter 9, 11, 12, or 13 of this title, of an executory contract or unexpired lease of the debtor that has not been assumed shall be determined, and shall be allowed under subsection (a), (b), or (c) of this section or disallowed under subsection (d) or (e) of this section, the same as if such claim had arisen before the date of the filing of the petition.

(h) A claim arising from the recovery of property under section 522, 550, or 553 of this title shall be determined, and shall be allowed under subsection (a), (b), or (c) of this section, or disallowed under subsection (d) or (e) of this section, the same as if such claim had arisen before the date of the filing of the petition.

(i) A claim that does not arise until after the commencement of the case for a tax entitled to priority under section 507(a) (7) of this title shall be determined, and shall be allowed under sub-

section (a), (b), or (c) of this section, or disallowed under subsection (d) or (e) of this section, the same as if such claim had arisen before the date of the filing of the petition.

(j) A claim that has been allowed or disallowed may be reconsidered for cause. A reconsidered claim may be allowed or disallowed according to the equities of the case. Reconsideration of a claim under this subsection does not affect the validity of any payment or transfer from the estate made to a holder of an allowed claim on account of such allowed claim that is not reconsidered, but if a reconsidered claim is allowed and is of the same class as such holder's claim, such holder may not receive any additional payment or transfer from the estate on account of such holder's allowed claim until the holder of such reconsidered and allowed claim receives payment on account of such claim proportionate in value to that already received by such other holder. This subsection does not alter or modify the trustee's right to recover from a creditor any excess payment or transfer made to such creditor.

45 U.S.C. § 152.

§ 152. General duties

First. Duty of carriers and employees to settle disputes

It shall be the duty of all carriers, their officers, agents, and employees to exert every reasonable effort to make and maintain agreements concerning rates of pay, rules, and working conditions, and to settle all disputes, whether arising out of the application of such agreements or otherwise, in order to avoid any interruption to commerce or to the operation of any carrier grow-

ing out of any dispute between the carrier and the employees thereof.

Second. Consideration of disputes by representatives

All disputes between a carrier or carriers and its or their employees shall be considered, and, if possible, decided, with all expedition, in conference between representatives designated and authorized so to confer, respectively, by the carrier or carriers and by the employees thereof interested in the dispute.

Third. Designation of representatives

Representatives, for the purposes of this chapter, shall be designated by the respective parties without interference, influence, or coercion by either party over the designation of representatives by the other; and neither party shall in any way interfere with, influence, or coerce the other in its choice of representatives. Representatives of employees for the purposes of this chapter need not be persons in the employ of the carrier, and no carrier shall, by interference, influence, or coercion seek in any manner to prevent the designation by its employees as their representatives of those who or which are not employees of the carrier.

Fourth. Organization and collective bargaining; freedom from interference by carrier; assistance in organizing or maintaining organization by carrier forbidden; deduction of dues from wages forbidden

Employees shall have the right to organize and bargain collectively through representatives of their own choosing. The majority of any craft or class of employees shall have the right to

determine who shall be the representative of the craft or class for the purposes of this chapter. No carrier, its officers or agents, shall deny or in any way question the right of its employees to join, organize, or assist in organizing the labor organization of their choice, and it shall be unlawful for any carrier to interfere in any way with the organization of its employees, or to use the funds of the carrier in maintaining or assisting or contributing to any labor organization, labor representative, or other agency of collective bargaining, or in performing any work therefor, or to influence or coerce employees in an effort to induce them to join or remain or not to join or remain members of any labor organization, or to deduct from the wages of employees any dues, fees, assessments, or other contributions payable to labor organizations, or to collect or to assist in the collection of any such dues, fees, assessments, or other contributions: *Provided*, That nothing in this chapter shall be construed to prohibit a carrier from permitting an employee, individually, or local representatives of employees from conferring with management during working hours without loss of time, or to prohibit a carrier from furnishing free transportation to its employees while engaged in the business of a labor organization.

Fifth. Agreements to join or not to join labor organizations forbidden

No carrier, its officers, or agents shall require any person seeking employment to sign any contract or agreement promising to join or not to join a labor organization; and if any such contract has been enforced prior to the effective date of this chapter, then such carrier shall notify the employees by an appropriate order that such contract has been discarded and is no longer binding on them in any way.

Sixth. Conference of representatives; time; place; private agreements

In case of a dispute between a carrier or carriers and its or their employees, arising out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions, it shall be the duty of the designated representative or representatives of such carrier or carriers and of such employees, within ten days after the receipt of notice of a desire on the part of either party to confer in respect to such dispute, to specify a time and place at which such conference shall be held: *Provided*, (1) That the place so specified shall be situated upon the line of the carrier involved or as otherwise mutually agreed upon; and (2) that the time so specified shall allow the designated conferees reasonable opportunity to reach such place of conference, but shall not exceed twenty days from the receipt of such notice: *And provided further*, That nothing in this chapter shall be construed to supersede the provisions of any agreement (as to conferences) then in effect between the parties.

Seventh. Change in pay, rules, or working conditions contrary to agreement or to section 156 forbidden

No carrier, its officers or agents shall change the rates of pay, rules, or working conditions of its employees, as a class as embodied in agreements except in the manner prescribed in such agreements or in section 156 of this title.

Eighth. Notices of manner of settlement of disputes; posting

Every carrier shall notify its employees by printed notices in such form and posted at such times and places as shall be specified by the Mediation Board that all disputes between the carrier and

its employees will be handled in accordance with the requirements of this chapter, and in such notices there shall be printed verbatim, in large type, the third, fourth, and fifth paragraphs of this section. The provisions of said paragraphs are hereby made a part of the contract of employment between the carrier and each employee, and shall be held binding upon the parties, regardless of any other express or implied agreements between them.

Ninth. Disputes as to identity of representatives; designation by Mediation Board; secret elections

If any dispute shall arise among a carrier's employees as to who are the representatives of such employees designated and authorized in accordance with the requirements of this chapter, it shall be the duty of the Mediation Board, upon request of either party to the dispute, to investigate such dispute and to certify to both parties, in writing, within thirty days after the receipt of the invocation of its services, the name or names of the individuals or organizations that have been designated and authorized to represent the employees involved in the dispute, and certify the same to the carrier. Upon receipt of such certification the carrier shall treat with the representative so certified as the representative of the craft or class for the purposes of this chapter. In such an investigation, the Mediation Board shall be authorized to take a secret ballot of the employees involved, or to utilize any other appropriate method of ascertaining the names of their duly designated and authorized representatives in such manner as shall insure the choice of representatives by the employees without interference, influence, or coercion exercised by the carrier. In the conduct of any election for the purposes herein indicated the Board shall designate who may participate in the election and establish the rules to govern the election, or may appoint a committee of three neutral persons who after hearing shall within ten

days designate the employees who may participate in the election. The Board shall have access to and have power to make copies of the books and records of the carriers to obtain and utilize such information as may be deemed necessary by it to carry out the purposes and provisions of this paragraph.

Tenth. Violations; prosecution and penalties

The willful failure or refusal of any carrier, its officers or agents to comply with the terms of the third, fourth, fifth, seventh, or eighth paragraph of this section shall be a misdemeanor, and upon conviction thereof the carrier, officer, or agent offending shall be subject to a fine of not less than $1,000 nor more than $20,000 or imprisonment for not more than six months, or both fine and imprisonment, for each offense, and each day during which such carrier, officer, or agent shall willfully fail or refuse to comply with the terms of the said paragraphs of this section shall constitute a separate offense. It shall be the duty of any United States attorney to whom any duly designated representative of a carrier's employees may apply to institute in the proper court and to prosecute under the direction of the Attorney General of the United States, all necessary proceedings for the enforcement of the provisions of this section, and for the punishment of all violations thereof and the costs and expenses of such prosecution shall be paid out of the appropriation for the expenses of the courts of the United States: *Provided*, That nothing in this chapter shall be construed to require an individual employee to render labor or service without his consent, nor shall anything in this chapter be construed to make the quitting of his labor by an individual employee an illegal act; nor shall any court issue any process to compel the performance by an individual employee of such labor or service, without his consent.

Eleventh. Union security agreements; check-off

Notwithstanding any other provisions of this chapter, or of any other statute or law of the United States, or Territory thereof, or of any State, any carrier or carriers as defined in this chapter and a labor organization or labor organizations duly designated and authorized to represent employees in accordance with the requirements of this chapter shall be permitted—

(a) to make agreements, requiring, as a condition of continued employment, that within sixty days following the beginning of such employment, or the effective date of such agreements, whichever is the later, all employees shall become members of the labor organization representing their craft or class: *Provided*, That no such agreement shall require such condition of employment with respect to employees to whom membership is not available upon the same terms and conditions as are generally applicable to any other member or with respect to employees to whom membership was denied or terminated for any reason other than the failure of the employee to tender the periodic dues, initiation fees, and assessments (not including fines and penalties) uniformly required as a condition of acquiring or retaining membership.

(b) to make agreements providing for the deduction by such carrier or carriers from the wages of its or their employees in a craft or class and payment to the labor organization representing the craft or class of such employees, of any periodic dues, initiation fees, and assessments (not including fines and penalties) uniformly required as a condition of acquiring or retaining membership: *Provided*, That no such agreement shall be

effective with respect to any individual employee until he shall have furnished the employer with a written assignment to the labor organization of such membership dues, initiation fees, and assessments, which shall be revocable in writing after the expiration of one year or upon the termination date of the applicable collective agreement, whichever occurs sooner.

(c) The requirement of membership in a labor organization in an agreement made pursuant to subparagraph (a) of this paragraph shall be satisfied, as to both a present or future employee in engine, train, yard, or hostling service, that is, an employee engaged in any of the services or capacities covered in the First division of paragraph (h) of section 153 of this title defining the jurisdictional scope of the First Division of the National Railroad Adjustment Board, if said employee shall hold or acquire membership in any one of the labor organizations, national in scope, organized in accordance with this chapter and admitting to membership employees of a craft or class in any of said services; and no agreement made pursuant to subparagraph (b) of this paragraph shall provide for deductions from his wages for periodic dues, initiation fees, or assessments payable to any labor organization other than that in which he holds membership: *Provided, however*, That as to an employee in any of said services on a particular carrier at the effective date of any such agreement on a carrier, who is not a member of any one of the labor organizations, national in scope, organized in accordance with this chapter and admitting to membership employees of a craft or class in any of said services, such employee, as a condition of continuing his employment, may be required to become a member of the organization representing the craft in which he is employed on the effective date of the first

agreement applicable to him: *Provided, further*, That nothing herein or in any such agreement or agreements shall prevent an employee from changing membership from one organization to another organization admitting to membership employees of a craft or class in any of said services.

(d) Any provisions in paragraphs Fourth and Fifth of this section in conflict herewith are to the extent of such conflict amended.

45 U.S.C. § 155

§ 155. Functions of Mediation Board

First. Disputes within jurisdiction of Mediation Board

The parties, or either party, to a dispute between an employee or group of employees and a carrier may invoke the services of the Mediation Board in any of the following cases:

(a) A dispute concerning changes in rates of pay, rules, or working conditions not adjusted by the parties in conference.

(b) Any other dispute not referable to the National Railroad Adjustment Board and not adjusted in conference between the parties or where conferences are refused.

The Mediation Board may proffer its services in case any labor emergency is found by it to exist at any time.

In either event the said Board shall promptly put itself in communication with the parties to such controversy, and shall use its best efforts, by mediation, to bring them to agreement. If such efforts to bring about an amicable settlement through mediation shall be unsuccessful, the said Board shall at once endeavor as its final required action (except as provided in paragraph third of this section and in section 160 of this title) to induce the parties to submit their controversy to arbitration, in accordance with the provisions of this chapter.

If arbitration at the request of the Board shall be refused by one or both parties, the Board shall at once notify both parties in writing that its mediatory efforts have failed and for thirty days thereafter, unless in the intervening period the parties agree to arbitration, or an emergency board shall be created under section 160 of this title, no change shall be made in the rates of pay, rules, or working conditions or established practices in effect prior to the time the dispute arose.

Second. Interpretation of agreement

In any case in which a controversy arises over the meaning or the application of any agreement reached through mediation under the provisions of this chapter, either party to the said agreement, or both, may apply to the Mediation Board for an interpretation of the meaning or application of such agreement. The said Board shall upon receipt of such request notify the parties to the controversy, and after a hearing of both sides give its interpretation within thirty days.

Third. Duties of Board with respect to arbitration of disputes; arbitrators; acknowledgment of agreement; notice to arbitrators; reconvening of arbitrators; filing contracts with Board; custody of records and documents

The Mediation Board shall have the following duties with respect to the arbitration of disputes under section 157 of this title:

(a) On failure of the arbitrators named by the parties to agree on the remaining arbitrator or arbitrators within the time set by section 157 of this title, it shall be the duty of the Mediation Board to name such remaining arbitrator or arbitrators. It shall be the duty of the Board in naming such arbitrator or arbitrators to appoint only those whom the Board shall deem wholly disinterested in the controversy to be arbitrated and impartial and without bias as between the parties to such arbitration. Should, however, the Board name an arbitrator or arbitrators not so disinterested and impartial, then, upon proper investigation and presentation of the facts, the Board shall promptly remove such arbitrator.

If an arbitrator named by the Mediation Board, in accordance with the provisions of this chapter, shall be removed by such Board as provided by this chapter, or if such an arbitrator refuses or is unable to serve, it shall be the duty of the Mediation Board, promptly, to select another arbitrator, in the same manner as provided in this chapter for an original appointment by the Mediation Board.

(b) Any member of the Mediation Board is authorized to take the acknowledgment of an agreement to arbitrate under this chapter. When so acknowledged, or when acknowledged by the parties before a notary public or the clerk of a district court or a

court of appeals of the United States, such agreement to arbitrate shall be delivered to a member of said Board or transmitted to said Board, to be filed in its office.

(c) When an agreement to arbitrate has been filed with the Mediation Board, or with one of its members, as provided by this section, and when the said Board has been furnished the names of the arbitrators chosen by the parties to the controversy it shall be the duty of the Board to cause a notice in writing to be served upon said arbitrators, notifying them of their appointment, requesting them to meet promptly to name the remaining arbitrator or arbitrators necessary to complete the Board of Arbitration, and advising them of the period within which, as provided by the agreement to arbitrate, they are empowered to name such arbitrator or arbitrators.

(d) Either party to an arbitration desiring the reconvening of a board of arbitration to pass upon any controversy arising over the meaning or application of an award may so notify the Mediation Board in writing, stating in such notice the question or questions to be submitted to such reconvened Board. The Mediation Board shall thereupon promptly communicate with the members of the Board of Arbitration, or a subcommittee of such Board appointed for such purpose pursuant to a provision in the agreement to arbitrate, and arrange for the reconvening of said Board of Arbitration or subcommittee, and shall notify the respective parties to the controversy of the time and place at which the Board, or the subcommittee, will meet for hearings upon the matters in controversy to be submitted to it. No evidence other than that contained in the record filed with the original award shall be received or considered by such reconvened Board or subcommittee, except such evidence as may be necessary to illustrate the interpretations suggested by the parties. If any member of the

original Board is unable or unwilling to serve on such reconvened Board or subcommittee thereof, another arbitrator shall be named in the same manner and with the same powers and duties as such original arbitrator.

(e) Within sixty days after June 21, 1934, every carrier shall file with the Mediation Board a copy of each contract with its employees in effect on the 1st day of April 1934, covering rates of pay, rules, and working conditions. If no contract with any craft or class of its employees has been entered into, the carrier shall file with the Mediation Board a statement of that fact including also a statement of the rates of pay, rules, and working conditions applicable in dealing with such craft or class. When any new contract is executed or change is made in an existing contract with any class or craft of its employees covering rates of pay, rules, or working conditions, or in those rates of pay, rules, and working conditions of employees not covered by contract, the carrier shall file the same with the Mediation Board within thirty days after such new contract or change in existing contract has been executed or rates of pay, rules, and working conditions have been made effective.

(f) The Mediation Board shall be the custodian of all papers and documents heretofore filed with or transferred to the Board of Mediation bearing upon the settlement, adjustment, or determination of disputes between carriers and their employees or upon mediation or arbitration proceedings held under or pursuant to the provisions of any Act of Congress in respect thereto; and the President is authorized to designate a custodian of the records and property of the Board of Mediation until the transfer and delivery of such records to the Mediation Board and to require the transfer and delivery to the Mediation Board of any and all such papers and documents filed with it or in its possession.

45 U.S.C. § 156

§ 156. Procedure in changing rates of pay, rules, and working conditions

Carriers and representatives of the employees shall give at least thirty days' written notice of an intended change in agreements affecting rates of pay, rules, or working conditions, and the time and place for the beginning of conference between the representatives of the parties interested in such intended changes shall be agreed upon within ten days after the receipt of said notice, and said time shall be within the thirty days provided in the notice. In every case where such notice of intended change has been given, or conferences are being held with reference thereto, or the services of the Mediation Board have been requested by either party, or said Board has proffered its services, rates of pay, rules, or working conditions shall not be altered by the carrier until the controversy has been finally acted upon as required by section 155 of this title, by the Mediation Board, unless a period of ten days has elapsed after termination of conferences without request for or proffer of the services of the Mediation Board.